Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

In the Matter of the Complaint

of

TONQUIN FISHERIES, INC., a Washington corporation, owner of the F/V TONQUIN, Official Number 529425, for Exoneration From or Limitation of Liability,

Petitioner.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the doctrine of comparative negligence, the cornerstone of modern maritime law, is displaced by 45 U.S.C. § 53, whenever a violation of an administrative safety regulation is found, and even where the violation was in whole or in part the fault of the seaman on whose behalf suit is brought.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1-7) is unreported. The Judgment and Findings of Fact and Conclusions of Law of the district court (App. *infra*, 8-16) are unreported.

JURISDICTION

The court of appeals entered its judgment on August 15, 1995 (App., *infra*, 1). Appellant petitioned for a rehearing en banc on August 28, 1995, which petition is still pending. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE

45 U.S.C. § 53 Contributory negligence; diminution of damages.

> In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such

common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 1949, § 3, 35 Stat. 66.)

STATEMENT

A. Facts

This case arose out of the sinking of the vessel F/V TONQUIN in a storm on October 13, 1991. All crewmembers were rescued except for the vessel's master, Captain Lawrence Tousignant, who is presumed to have drowned.

Captain Tousignant became TONQUIN's master in May or June of 1991, and fished her uneventfully until the incident some five months later.[1] Captain Tousignant was an experienced fisherman, and assumed control over general safety conditions on the vessel, as appropriate for the captain of a vessel.[2] According to the district court findings at trial, there were two Coast Guard violations at the time of the sinking: 1) an inoperative bilge alarm, and 2) the survival suits on board did not have flash lights on them. (App., *infra*, 11)

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[1] The evidence cited in the following paragraphs, relevant to Tousignant and his actions, remained uncontroverted in the limitation proceeding before the court.

[2] As discussed below, Captain Tousignant's duties regarding safety equipment was not an issue before the trial court in the limitation proceeding, and while some testimony was presented relating Captain Tousignant's duties, the issue of his duties and authority will require further development in later hearings.

Tousignant had access to assistance for repairing components of the vessel's electrical system, from the engineer on the vessel's sister ship, but did not ask for help to have the bilge alarm repaired. On at least one occasion, Captain Tousignant returned to port in order to have the vessel (its winches) repaired, so that he and his crew could continue fishing.

The vessel was at sea when the storm arrived. At some point thereafter, Captain Tousignant decided to stop fishing and try to ride out the storm rather than immediately seek shelter. Captain Tousignant went to bed and left another crewmember at the wheel. The crewmember realized the vessel was in trouble and taking on water when it took a hard list to starboard. Captain Tousignant and the rest of the crew were awakened, and Captain Tousignant broadcasted a mayday.

The crew donned survival suits and deployed the vessel's life raft. Captain Tousignant told the crew to tie themselves to lines attached to the liferaft, which other crewmembers suspected was a line attached to the sinking vessel. While none of the crew complied with the instruction, obviously believing such action to be unwise and unsafe,[3] Captain Tousignant took a line and may have tied himself to it. The vessel went under, and Tousignant's body was never recovered.

---

[3] As one of the crewmembers later stated, "I'm not going to tie myself off to any kind of weight that's sinking, pardner (sic)" (Rhol 36:19-20).

B. Proceedings Below

Tonquin filed for limitation of liability pursuant to 46 U.S.C. § 181-185, in the United States District Court for the Western District of Washington, which is the forum in which the Tousignant family resides, as well as the location of Tonquin's principal place of business. The basis for federal jurisdiction was the district court's original admiralty or maritime jurisdiction under 28 U.S.C. § 1333. The Ninth Circuit Court of Appeals had jurisdiction over this appeal from the United States District Court for the Western District of Washington under 28 U.S.C. § 41 and § 1291.

Shortly before the limitation action was to be tried, and despite the injunction, claimant Ymanda Tousignant filed a claim against Tonquin. Just days before trial, on July 30, 1993, claimant moved the trial court to shorten time and dissolve the stay to permit the filing of an action at law. In her request to dissolve the stay, claimant asked that the court try **only** the issue of Tonquin's right to exoneration from or limitation of liability at the upcoming trial. Counsel stated:

> In this case, as the limitation matter is set for trial on August 2 and the parties are prepared to proceed at that time, the claimant proposes to the court that the limitation issues *only* be tried on August 2, 1993. The claimant should be permitted to file her action at law pursuant to 46 U.S.C. § 688 [Jones Act] and to proceed with her damages claim before a jury.

(App., *infra*, 40) (emphasis added).

The trial court granted claimant's motion, dissolved the stay and ordered "that the issues of limitation of liability *only* will be heard and tried by this court at trial on August 2, 1993" (App., *infra*, 37). Accordingly, the parties prepared for trial on the sole issue of limitation of liability. Neither party addressed issues relating to damages, Captain Tousignant's individual responsibility for any unseaworthy condition found, or comparative negligence issues in the Pretrial Order. Whether, and to what extent that Captain Tousignant may have been responsible for any negligence or unseaworthiness, or regulatory violations, as a managing employee of Tonquin was not before the court, and has never been tried. Because the issue of comparative negligence was reserved for later trial, Tonquin made no effort to put on evidence regarding such issues at the trial.

The issue of a captain's comparative negligence is not an element of the analysis in determining limitation of liability. Despite this fact, the trial court held that Captain Tousignant's estate had proven negligence and unseaworthiness sufficiently to impose prima facie liability in the context of the limitation action. Using its finding that the regulatory violations existed, the trial court then used the rule of *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1873), to reverse the burden of proof of causation, and determined that Tonquin had failed to prove that the lack of alarm and survival suit lights were not proximate causes of the sinking, or could not have been the cause of the captain's death.

The district court entered Findings of Fact and Conclusions of Law on February 10, 1994, in the form submitted by the estate of Captain Tousignant (App., *infra*, 8-15).

Despite the pretrial motion of claimant Captain Tousignant's estate that trial be strictly limited to limitation issues, and which motion was granted, and despite the fact that issues other than limitation issues were not even argued at trial, the findings and conclusions of law the estate's counsel submitted were not restricted to the issues of limitation of liability. The findings and conclusions contained the following conclusions:

> 14. Tonquin . . . is liable to the Estate of Lawrence Tousignant for all damages caused by the death of Lawrence Tousignant.
>
> 15. The Estate of Lawrence Tousignant may proceed to a trial by jury on its claim on the issue of damages only. No other issue remains to be determined.

(App., *infra*, 14).

The district court entered its judgment on February 23, 1994, and found, in part, that the survival suits on the vessel (of which it found an adequate number) lacked lights in violation of 46 C.F.R. § 25.25-13, and that the vessel did not have a functioning alarm in violation of 46 C.F.R. § 28.250. The district court denied limitation of liability (App., *infra*, 16). Without taking evidence on the issue of Captain Tousignant's own responsibility for the regulatory violations (or any other conditions) in his role as master of the vessel, the district court went beyond its limitation ruling, invoked 45 U.S.C. § 53, and held that the violations necessarily precluded Tonquin, as a matter of law, from putting on evidence, at the next trial, that Captain Tousignant was wholly or partially responsible for the violations.

On March 8, 1994, Tonquin Fisheries moved to amend the Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52(b) (App., *infra*, 17). Tonquin specifically sought amendment with reference to the Court's implicit ruling prohibiting Tonquin from asserting defenses to the estate's claims for damages, including comparative negligence (App., *infra*, 19-24). The district court denied Tonquin's motion, stating:

> The matter of asserting comparative negligence defenses on the issue of damages was addressed in the parties' earlier arguments on Conclusion of Law 14 and 15. Tonquin may not assert the contributory negligence of Lawrence Tousignant in defense of the damage claim because the Court has found that violation of safety statutes, specifically Coast Guard regulations concerning bilge alarms and lights on survival suits contributed to the sinking of the vessel and/or the death of Lawrence Tousignant. *See* 46 U.S.C. § 688 and 45 U.S.C. § 53.

(App., *infra*, 34-35).

Tonquin filed its Notice of Appeal on April 22, 1994. On August 15, 1995, the Ninth Circuit Court of Appeals affirmed the district court's decision (App., *infra*, 1-7). Petitioner-Appellant petitioned for a rehearing en banc on August 28, 1995.

REASONS FOR GRANTING THE PETITION

The primary legal issue is whether 45 U.S.C. § 53 should be combined with other presumptions (such as that arising under the rule of *The PENNSYLVANIA*, 86

U.S. (19 Wall.) 125, 22 L.Ed. 148 (1873)), to impose strict, and absolute liability by utterly precluding a vessel owner from asserting the defense of comparative negligence, even where its captain who is wholly or partially responsible for the conditions giving rise to liability is the seaman on whose behalf suit is brought. This Ninth Circuit would undermine the foundation of modern maritime tort law as mandated by the United States Supreme Court in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 44 L.Ed.2d 251, 95 S.Ct. 1708 (1975). Moreover, the precedent would not only have the perverse consequence of imposing liability without fault, it would actually allow a seaman to establish liability of a vessel owner based on the seaman's own fault.

The Ninth Circuit's construction of § 53 is not supported by well-reasoned cases, sound policy, or a logical analysis of the statute. Section 53 should not be construed to preclude comparative negligence, as a matter of law, under any circumstances. Even if the Court construes the section to bar comparative negligence under some circumstances, it should not be construed to bar a party from asserting comparative negligence as a defense when the injured party may have violated regulations of which he had a duty to comply and which ultimately led to his death. Particularly, § 53 should not have operated to bar Tonquin from asserting the defense of Captain Tousignant's comparative fault with respect to the regulatory violations at issue.

I. The Ninth Circuit's Decision in this Case Is Based on an Erroneous Interpretation of 45 U.S.C. § 53.

A. Personal Responsibility is the Standard.

Comparative fault is the cornerstone of modern maritime law. Courts sitting in admiralty have long recognized that each party is to bear responsibility for its own conduct. A seaman's damages are appropriately reduced by the percent by which his injury is attributable to his own conduct or fault, even if that means diminishment of the recovery to nothing. That was the standard for seaman's personal injury cases long before the United States Supreme Court mandated such a result for maritime cases generally. *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 407, 44 L.Ed.2d 251, 95 S.Ct. 1708 (1975); *see also Dickens v. United States*, 815 F. Supp. 913, 918-19 (E.D. Va. 1993) (recovery reduced by 100%); *Williams v. Hollywood Marine*, 717 F. Supp. 437, 446 (E.D. La. 1989) (recovery for seaman experienced in handling hose equipment and yet who negligently pointed hose toward himself was reduced by 50%); *Superior Oil Co. v. Trahan*, 322 F.2d 234, 236-37 (5th Cir. 1963) (although seaman established negligence, unseaworthiness and proximate cause, seaman's award was appropriately reduced by 75%, for seaman's own negligence); *Walsh v. Boston Sand & Gravel Co.*, 175 F. Supp. 411, 413 (D. Mass. 1959) (seaman's negligence in stepping in bight of a line and in paying out an excessive amount of line justified reduction of recovery by 70%, although vessel was unseaworthy because improper line was supplied).

Particularly where, as here, the decedent as master of the vessel, had responsibilities for complying with safety

regulations, a finding of significant comparative negligence must be considered. Any argument that the decedent should be entitled to avoid all responsibility for his own conduct, solely because the trial court determined that a regulatory violation existed, comports with neither well-reasoned precedence nor logic.

B. Section 53 Does Not Address Comparative Fault.

The plain language of § 53 does not bar the assessment of comparative fault. Section 53 states, in pertinent part:

> "[n]o such employee who may be injured . . . shall be held to have been guilty of **contributory negligence** in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury. . . . "

45 U.S.C. § 53 (emphasis added). The section, by its very terms, addresses only contributory negligence, not comparative fault.

C. Congress Did Not Intend to Preclude Comparative Fault.

The lower court's construction of § 53, that Captain Tousignant's comparative fault may not be assessed regardless of his role in creating or allowing any regulatory violations while he was in command of the vessel, is inconsistent with the section's language. Particularly in

the context of maritime law, § 53 should not be construed as broadly as the Ninth Circuit has chosen to read it.

Both FELA and the Jones Act were enacted in a different era, when contributory negligence served as a complete bar to recovery and the Coast Guard's regulatory scheme at issue here did not exist.[4] In the last half century courts generally have adopted comparative negligence as the cornerstone of tort law, and the United States Supreme Court has imposed comparative negligence on all aspects of admiralty. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 407, 44 L.Ed.2d 251, 95 S.Ct. 1708 (1975). Given that comparative, rather than absolute, liability is the law of the land, the court's determination that § 53 should be construed so as to impose absolute liability, in an admiralty case, was error.

The Fifth Circuit discussed Congress' intent in adopting § 53 in *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820, 824 (5th Cir. 1965). In *Page*, the Fifth Circuit opined:

> Thus the purpose [of adopting of § 53's ban of contributory negligence] is to accord damages where the injuries are caused wholly from the negligence of the railroad or where caused partly by its negligence and partly by action of others. The other would, of course, include the injured worker too. The object was to free this new legislatively created right [to recover for

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[4] Section 3 of the Federal Employers' Liability Act, 45 U.S.C. § 53, was enacted in 1908; the Jones Act, 46 U.S.C. § 688, *et seq.* dates from 1915.

> the negligence of fellow servants] of the common law defenses and refinements **and to supply in its stead a simplified structure in which damages would be borne by the railroad and the injured worker in proportion to their respective faults.**

Page, 349 F.2d at 824 (emphasis added). Thus, the Fifth Circuit has observed that Congress' intent in enacting § 53 was not to prevent the application of the doctrine of comparative negligence.

D. Congress Intended 45 U.S.C. § 53 To Promote Safety and Compliance with Safety Statutes.

The clear intent of the section was to promote compliance with safety statutes enacted for the safety of employees, which is the general goal of FELA. *San Antonio & A.P.R. Co. v. Wagner*, 241 U.S. 476, 481, 60 L.Ed. 1110, 36 S.Ct. 626 (1916); *Sowards v. Chesapeake & O. Ry. Co.*, 580 F.2d 713, 714 (4th Cir. 1978). It is illogical and inconsistent with the manifest intent of FELA, including § 53, to interpret it in a manner that relieves a managing employee from his responsibility for ensuring compliance with regulations.

Fortunately, there is no need to interpret § 53 to mandate such a perverse result. The second part of the section (after the colon, and beginning with the word "*Provided*"), applies only where the "common carrier" (employer), rather than the employee, is the entity responsible for the violation of a statute enacted for the safety of employees. To the extent that the employee was responsible for the violation, the section, by its very

terms, would not preclude the employee from being held partially or wholly at fault, and any recovery should be reduced accordingly.

E. The Ninth Circuit's Interpretation of § 53 is Contrary to Responsible Public Policy and the Intent of FELA.

It defies all rational policy considerations to read § 53 so broadly as to use the violation of a regulation to preclude comparative negligence, as a matter of law, and allow the estate of the very person whose duties included conforming to the regulation to fully recover, despite the deceased's dereliction of duties.

The Ninth Circuit's determination that liability should be imposed on Tonquin, without defense against Captain Tousignant's estate, gave the estate a windfall. The Ninth Circuit should not have ignored the discussions about personal responsibility set forth in Judge Hamley's dissent in *Admiral Towing Company v. Woolen*, 290 F.2d 641, 652 (9th Cir. 1961), cited with approval in *Petition of New England Fish Co.*, 465 F. Supp. 1003 (W.D. Wash. 1979). A person should be responsible for his own conduct in an action brought by or for himself.

The Ninth Circuit's decision to impose absolute liability does nothing to promote safety, the goal of FELA and of the Coast Guard regulations (which regulations the Court used to preclude Tonquin from asserting defenses based on Captain Tousignant's conduct). The Court's disposition of this matter provides no incentive for future captains or supervisory personnel to follow regulations to ensure safe conditions at sea, as they or

their survivors will not be held responsible for their own actions or inaction. Nor will the decision alter the conduct of vessel owners. Vessel owners must necessarily rely on the masters of their vessel to carry out the safety management responsibilities with which they have been entrusted.

The Ninth Circuit's erroneous construction of § 53 is illustrated by the rigidity of the rule the court adopted. Under the court's holding, a vessel owner who retains a captain who chooses to remove fire extinguishers, would be liable to the captain's estate, without diminution for comparative fault, if the captain was killed in a fire aboard the vessel. A decision that mandates such extreme results should not be allowed to stand.

F. Section 53 Does Not Address Regulations.

In this case, the defendant was only found to have violated a regulation promulgated by the Coast Guard, a mere agency of the Executive Branch. Section 53 addresses only a "statute enacted" by Congress. A statute is by definition only a law enacted by a legislative body, which the Coast Guard is not. No statute was violated in this case. This clear distinction should render § 53 inapplicable to this case.

II. The Ninth Circuit's Holding Is Inconsistent with the Holdings of Other Courts Within the Ninth Circuit.

Courts within the Ninth Circuit have not applied 45 U.S.C. § 53 to operate as a complete bar from considering comparative fault, and are generally reluctant to allow persons to completely escape responsibility for their own conduct. Despite such precedent, the Ninth Circuit erroneously held that § 53 precludes a vessel owner from asserting the defenses of comparative negligence and Primary Duty even where the complaining party was responsible for the conditions giving rise to liability.

Heath v. Matson Navigation Co., 333 F. Supp. 131 (D. Hawaii 1971), involved an injury to a crewmember, not responsible for the condition that caused his injury. The seaman moved for summary judgment, arguing that the shipowner was precluded from asserting comparative negligence, because of the existence of regulatory violations. The seaman cited *Kernan v. American Dredging Co.*, 355 U.S. 426, 2 L.Ed.2d 382, 78 S.Ct. 394 (1958), and *Neal v. Saga Shipping Co.*, 407 F.2d 481 (5th Cir.), *cert. den.* 395 U.S. 986 (1969).[5] The court denied the seaman's motion, based on causation issues and because the court did not agree that § 53 precluded comparative negligence as a matter of law. In *Heath*, the court correctly noted that *Kernan*'s holding was limited to the concept of negligence *per se*,

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[5] Both *Kernan* and *Neal* were heavily relied upon by the prevailing party below. Additionally, *Kopczynski* and *Roy Crook*, the two primary cases upon which the Ninth Circuit based its ruling, are based upon erroneous constructions of *Kernan* and *Neal*.

not the preclusion of comparative negligence. The *Heath* court disagreed with and distinguished *Neal*. *Neal*'s dependence on *Kernan* for a holding on comparative negligence (rather than negligence *per se*) was inaccurate. Also, *Neal* involved a longshoreman, and its discussion of FELA's impact on the Jones Act was complete dicta. *Heath*, 333 F. Supp. at 136. The Heath court declined to prohibit the employer from raising the defense of contributory negligence, despite the violation of a Coast Guard regulation. *Id.* at 136.

In *Bertholf v. Burlington Northern Railroad*, 402 F. Supp. 171 (E.D. Wash. 1975), the court was similarly reluctant to abandon comparative negligence, even in a non-admiralty case. There an injured railway employee brought action under FELA and sought a determination that his recovery not be diminished by his own conduct. The court refused to interpret § 53 to impose absolute liability on the employer where a safety statute other than one within the Safety Appliance Act had been violated. *Bertholf*, 402 F. Supp. at 172-73. Like the court in *Heath*, the *Bertholf* court distinguished *Kernan* and discredited *Neal*. *Id.* at 173.

Other opinions rendered by courts within the Ninth Circuit have shown similar reluctance to abandon the concept of holding persons responsible for their own conduct, without at least allowing inquiry into the facts. *See Admiral Towing Company v. Woolen*, 290 F.2d 641, 652-53 (9th Cir. 1961) (Circuit Judge Hamley's partial dissent); *Petition of New England Fish Co.*, 465 F. Supp. 1003, 1008-09 (W.D. Wash. 1979) (recovery for the death of the vessel's master was to be reduced by his own culpability, fifty percent).

In *Admiral Towing*, a vessel sank and her two person crew, composed of the captain and a very young, inexperienced hand, were lost. The court affirmed the denial of the vessel owner's petition for limitation of liability, based on the vessel owner's privity to the captain's negligence and vessel's unseaworthiness in sailing with an incompetent crew. While the case did not present the issue with which this court is presented, i.e., whether the recovery of the captain's survivors was immune from diminution, Circuit Judge Hamley's partial dissent pointed out a distinction that should rationally have been drawn between the grounds for liability to the different seamen. Judge Hamley noted that, as to the captain, liability should not have been based on negligence, because the captain's own negligent hiring created the circumstances for the incident in the first place. *Id.* at 652-53. The Ninth Circuit Court erred in abandoning such principles.

The opinions discussed above illustrate that the "employee" identified in 45 U.S.C. § 53 was not meant to include a vessel's master, particularly in situations such as between Captain Tousignant and Tonquin. The relationship of a vessel's master or captain to the vessel's owner is that of an agent to principal, and includes the obligations of a fiduciary. *Hansen v. Barnard*, 270 F. 163, 165 (2d Cir. 1920); *Mass. Lobstermen's Assoc. v. U.S.*, 554 F. Supp. 740, 742-43 (D. Mass. 1982). The master must act with the utmost attention in all of his dealings affecting the vessel. *The Styria*, 186 U.S. 1, 9, 45 L.Ed. 719, 21 S.Ct. 516 (1902). With respect to his crewmembers, the master is responsible for their safety, and stands in *loco parentis* to them. *The Iroquois*, 194 U.S. 240, 247, 48 L.Ed. 955, 24

S.Ct. 640 (1904). FELA should not be mechanically applied in favor of a vessel's captain, to automatically insulate him from his own conduct. This is consistent with the embracement of the comparative negligence rule by courts sitting in admiralty. *See Pennzoil Producing Co. v. Offshore Exp., Inc.*, 943 F.2d 1465, 1469, 1471-73 (5th Cir. 1991).

In summation, no law mandates the result that the Ninth Circuit reached, that 45 U.S.C. § 53 eliminates any assessment of Captain Tousignant's own conduct because violations of regulations existed before and during the time the Captain was in command of the vessel. Cases decided by the District Courts sitting in the Ninth Circuit support the contrary result. The issue of Captain Tousignant's comparative fault (regarding not only the safety issues aboard the vessel generally, but also his own conduct in tying himself off to a line while the vessel was sinking, as well as other issues) should be fully presented and argued before the finder of fact. Surely, Tonquin should not be precluded, as a matter of law, from raising Captain Tousignant's comparative culpability solely because the trial court, in the context of a limitation action, determined that Coast Guard regulations pertaining to high water alarms and lights on the survival suits were violated before and during the time Captain Tousignant commanded the vessel.

III. The Ninth Circuit's Reliance on *Kopczynski* and *Roy Crook* is Misplaced.

The Ninth Circuit's heavy reliance on *Kopczynski v. The JACQUELINE*, 742 F.2d 555 (9th Cir. 1984), *cert. denied*,

471 U.S. 1136, 105 S.Ct. 2677 (1984) and on *Roy Crook & Sons, Inc. v. Allen*, 778 F.2d 1037 (5th Cir. 1985), was misplaced.

In its Memorandum, the Ninth Circuit erroneously cites *Kopczynski* in support of it holding. (App. *infra*, 6). The question of when a court might use § 53 to eliminate assessment of the comparative fault of a vessel's master, charged with responsibility over the vessel's safety, was not before the court in *Kopczynski*. Moreover, there the court rejected a seaman's argument that his comparative negligence should not be allowed to reduce his damage award. The court declined to decide when, if ever, the violation of a safety statute or regulation might preclude assessment of comparative negligence. *Kopczynski*, 742 F.2d at 558.

In discussing comparative negligence, the only support the *Kopczynski* court found for the proposition that § 53 could be used to bar comparative negligence was *Neal v. Saga Shipping Co.*, 407 F.2d 481 (5th Cir.), *cert. denied*, 395 U.S. 986 (1969), a longshore case, and *Neal's* inaccurate reference to *Kernan*. As discussed above, *Kernan* contained **no** holding on the issue of comparative negligence, and the *Neal* court's use of the case for a holding on comparative fault was error.

The Ninth Circuit's reliance on *Roy Crook* is no more persuasive. There the Fifth Circuit adopted the faulty reasoning that it had previously rendered in *Neal*. This Court need not, and should not, perpetuate the Fifth Circuit's mistake.

IV. The Ninth Circuit's Reliance on Uncontested Limitation Analysis is Faulty.

The Ninth Circuit cites to uncontested portions of the district court's decision to support its determination regarding primary duty (App., *infra*, 1-7). Using careless analysis, the court erroneously equates the imposition of liability for conduct as against third parties with a person's responsibility for his own conduct.

Denial of limitation of liability is based on a determination that the vessel owner was in privity to or had knowledge of the bases for liability, negligence or unseaworthiness. *Farrell Lines v. Jones*, 530 F.2d 7, 10 (5th Cir. 1976). Privity or knowledge do not require a finding that the owner had actual knowledge. *Matter of Hechinger*, 890 F.2d 202, 207 (9th Cir. 1989), *cert. denied*, 498 U.S. 848, 111 S.Ct. 136, 112 L.Ed.2d 103 (1989); *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365, 1376 (5th Cir. 1983). Nor do the elements of privity and knowledge require any determination that the vessel owner had a duty to act apart from the duty of the master of its vessel. *Complaint of Patton-Tully Transp. Co.*, 797 F.2d 206, 211-12 (5th Cir. 1986).

The findings and conclusions of the district court which were uncontested for the purposes of the appeal, i.e., that a violation of a Coast Guard regulation within the owner's privity and knowledge had occurred, were undisputably rendered in the context of limitation of liability – whether violations of regulations for which Captain Tousignant was responsible and/or had knowledge could be imputed to Tonquin. The determinations of privity and knowledge resolved nothing on the question

of whether Captain Tousignant's breach of his primary duty and/or his comparative fault in allowing the violations to exist and in tying himself to a sinking ship may be assessed in a proceeding to determine what, if any, recovery his estate should have against the vessel owner. The Ninth Circuit's reliance on the district court's privity and knowledge findings was error.

V. The Question Presented Is Important.

The Ninth Circuit's holding in this case effectively decimates the comparative negligence doctrine out of existence and creates a situation where the negligent party (or his estate) financially benefits from the negligent party's negligence. Section 53 was not intended to provide negligent parties with a shield to prevent some portion of liability from being placed on the parties, such as Captain Tousignant, who have a duty to bring vessels into compliance with safety regulations, but nevertheless violate the safety regulations. Such a ruling is inconsistent with the most basic principle of modern tort law, which attempts to place the responsibility on the negligent parties as a matter of policy. Additionally, the Ninth Circuit's ruling does not further the safety concerns that are behind § 53 and FELA. Rather, parties are not encouraged to exercise care as they are ultimately not held responsible for their actions.

CONCLUSION

The Ninth Circuit erred in its analysis of precedence, as a matter of statutory construction, in its assessment of policy considerations, and in blurring the logical distinctions between findings made in the context of a limitation action with factual issues to be decided in subsequent proceedings. Section 53 should not be construed so as to preclude assessment of comparative negligence ever, and particularly in the situation presented here.

The petition for writ of certiorari should be granted.

DATED this 13th day of November, 1995.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of the Complaint of TONQUIN FISHERIES, INC., a Washington Corporation, owner of the F/V Tonquin, official no. 529425 for exoneration from or limitation of liability, Petitioner-Appellant, v. EVELYN WARD, Mother of Lawrence J. Tousignant, Captain of the Above-Named Vessel; YMANDA TOUSIGNANT as personal representative of the estate of Lawrence Tousignant, Defendants-Appellees.	No. 94-35422 D.C. No. CV-92-128D(M) MEMORANDUM* (Filed Aug. 15, 1995)

Appeal from the United States District Court
for the Western District of Washington,
Walter T. McGovern, District Judge, Presiding

Argued and Submitted July 21, 1995
Seattle, Washington

* This memorandum disposition is not appropriate for publication and may not be cited to except as provided by Ninth Circuit Rule 36-3.

Before: NOONAN and HAWKINS, Circuit Judges, and LEW, District Judge.**

Tonquin Fisheries, Inc. ("Tonquin") appeals from the district court's findings of fact and conclusions of law rendered after trial of the limitation of liability action below. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I.

This limitation of liability action arises out of the sinking of the vessel F/V Tonquin on October 13, 1991. All crew members except the vessel's captain, Lawrence Tousignant, were rescued from the vessel and survived. Captain Tousignant is presumed to have drowned.

On January 29, 1992, Tonquin Fisheries, the owner of the F/V Tonquin, filed a petition in admiralty for limitation of liability pursuant to 46 U.S.C. App. §§ 183 and 185 and Supplemental Rule F of the Federal Rules of Civil Procedure. In its petition, Tonquin contended that its vessel was seaworthy, that it was free from negligence with regard to the sinking or in the alternative, that it had no knowledge of any unseaworthiness or negligence. Thus, Tonquin contended that it was entitled to limit its liability for the sinking of the vessel to the value of its interest in the vessel. *See* 46 U.S.C. App. § 183.[1]

** Hon. Ronald S.W. Lew, United States District Judge for the Central District of California, sitting by designation.

[1] Section 183 provides, in pertinent part,

(a) The liability of the owner of any vessel, . . . for any . . . loss, damage, or injury by collision,

Following a bench trial of the limitation action, the district court, on February 10, 1994, issued its findings of fact and conclusions of law. The court ruled that because certain regulatory safety violations attributable to Tonquin caused Captain Tousignant's death, Tonquin would not be permitted to limit its liability. On April 1, 1994, the district court issued an order denying Tonquin's motion to amend the findings of fact and conclusions of law.

The district court's determination that Tonquin could not limit its liability is not challenged on appeal. Rather, Tonquin's appeal is limited to certain findings of fact and conclusions of law. Specifically, Tonquin challenges the district court's finding number eighteen, that during the months before the sinking of the F/V Tonquin, Tonquin Fisheries and its principal stockholder, Burton Parker, were in extreme financial distress and were unable to purchase the material or labor necessary to make the vessel safe and seaworthy. ER 83 at 4. Tonquin also challenges conclusions of law numbers fourteen and fifteen, holding that Tonquin Fisheries would be liable to the estate of Captain Tousignant ("the estate") for all damages arising from his death and that a later trial on the

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> or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. App. § 183. Title 46 U.S.C. § 185 and Supplemental Rule F, Fed. R. Civ. P., provide the procedural rules through which a vessel owner may bring a limitation action.

estate's claims against Tonquin would be limited to the issue of damages.

II.

We review an admiralty trial court's factual determinations for clear error. *Havens v. F/T Polar Mist*, 996 F.2d 215, 217 (9th Cir. 1993); *Newby v. F/V Kristen Gail*, 937 F.2d 1439, 1441 (9th Cir. 1991). Tonquin challenges the district court's finding number eighteen, claiming that evidence in the record of $40,000 to $100,000 being spent annually on maintenance of the F/V Tonquin indicates that the finding was clear error.

We find evidence in the record to support the district court's finding regarding the financial position of Tonquin Fisheries and its primary stockholder and thus affirm the district court's finding. While the evidence cited by Tonquin does support an argument that substantial amounts of money had, at one time, been spent on maintenance of the F/V Tonquin, other testimony supports the finding that in the months before the sinking of the vessel, Tonquin and Burton Parker were in a weak financial position. *See, e.g.*, RT 97, 98, 236; SER 273, 274. The district court's finding of fact eighteen shall therefore be **AFFIRMED.**

III.

An admiralty trial court's conclusions of law are reviewed de novo. *Havens*, 996 F.2d at 217; *Newby*, 937 F.2d at 1441. Likewise, a district court's construction of a statute is a question of law reviewed de novo. *United*

States v. Louisiana-Pacific Corp., 754 F.2d 1445, 1447 (9th Cir. 1985).

Tonquin contends that the district court's conclusions of law numbers fourteen and fifteen, which act to preclude it from raising issues of Captain Tousignant's comparative fault and primary duty, were rendered in error. Tonquin argues that the conclusions are an inaccurate interpretation of the law and moreover, that the issues were not properly before the district court in the limitation action.

We find the district court's conclusions to be a proper application of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 53 (incorporated into seaman's Jones Act claims by 46 U.S.C. § 688). Section 53 provides:

> In all actions . . . brought . . . to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. § 53.

In unchallenged portions of the district court's findings and conclusions, it held that violations of Coast Guard safety regulations were within the knowledge and

privity of Tonquin and its managing agents and that such violations were a proximate cause of Captain Tousignant's death. ER 83 at 4-6 (conclusions of law 1(a), 1(b), 2, 7). These findings and conclusions were necessary components of the district court's limitation analysis. *See Matter of Hechinger,* 890 F.2d 202, 207 (9th Cir. 1989) (in a limitation action, the court must determine what acts of negligence or unseaworthiness caused the accident), *cert. denied,* 498 U.S. 848, 111 S. Ct. 136 (1990).

Moreover, from these findings and conclusions flows the district court's determination under Section 53 that Tonquin would be liable to the estate for all damages arising out of Captain Tousignant's death and that Tonquin would be precluded from raising issues of Tousignant's comparative negligence. *See Kopczynski v. The Jacqueline,* 742 F.2d 555, 558 (9th Cir. 1984) (under Section 53 "comparative negligence[] may not be considered 'in any case where the violation by [the employer] of any statute enacted for the safety of employees contributed to the injury or death of such employee' "), *cert. denied,* 471 U.S. 1136, 105 S. Ct. 2677 (1985); *see also Roy Crook & Sons, Inc. v. Allen,* 778 F.2d 1037, 1039-41 (5th Cir. 1985).

Tonquin's argument that it should not be precluded from arguing issues of Captain Tousignant's primary duty is likewise unpersuasive. As part of its uncontested limitation analysis, the district court found that it was Tonquin's duty to equip its vessel with bilge alarms and lighted survival suits. ER 83 at 5 (conclusions of law 3(a), 3(b)). While Captain Tousignant may have *shared* this duty, the district court's finding renders the primary duty rule inapplicable. That rule only applies when the shipowner is not at fault and the seaman's own failure to

perform a "specific positive duty" was the *sole* cause of his death. *California Home Brands, Inc. v. Ferreira*, 871 F.2d 830, 836 (9th Cir. 1989); *Kendrick v. Illinois Central Gulf R.R.*, 669 F.2d 341, 344 (5th Cir. 1982).

Finding the district court's preclusion of issues of Captain Tousignant's comparative fault and primary duty to be a correct application of the law, the district court's conclusions of law fourteen and fifteen are **AFFIRMED.** We reject Tonquin's argument that Section 53 should have a different application in the context of claims made by a ship's captain. This argument has no foundation under the statute. *See Roy Crook & Sons, Inc. v. Allen*, 778 F.2d 1037, 1043 (5th Cir. 1985) (finding no exceptions to Section 53's application to the comparative fault of a ship's captain). Moreover, no error or prejudice can be attributed to the district court's preclusion of comparative fault and primary duty in the context of a limitation of liability action. Such preclusion flows directly from the issues necessarily determined by the district court in its limitation of liability analysis. For the foregoing reasons, the district court's decision is

AFFIRMED.

HONORABLE WALTER T. McGOVERN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In the Matter of the Complaint of TONQUIN FISHERIES, INC., a Washington corporation, owner of the F/V TONQUIN, Official Number 529425, for Exoneration From or Limitation of Liability, Plaintiff.	IN ADMIRALTY NO. C92-0128D(M) FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Feb. 10, 1994)

This matter was tried to the Court sitting without a jury on August 2 and 3, 1993. Having considered the testimony presented and the exhibits admitted, the Court finds and rules as follows:

I. FINDINGS OF FACT

1. The F/V TONQUIN was a 110 foot stern trawler of 199 gross tons and 142 net tons bearing official number 529425.

2. The F/V TONQUIN was a wooden hulled vessel built in approximately 1943.

3. The F/V TONQUIN was owned and operated by Tonquin Fisheries, Inc. The corporate president and primary stockholder of Tonquin Fisheries, Inc. is Burton

Parker. Other managing agents at the time of the sinking were the corporate secretary, Eben S. Parker and the business manager, Dyann Provenzano.

4. On October 13, 1991, the F/V TONQUIN was fishing approximately 50 miles off the south coast of Kodiak, Alaska.

5. Between 2:30 and 3:00 a.m. on October 13, 1991, the F/V TONQUIN sank.

6. At the time of its sinking, the F/V TONQUIN had five persons aboard, one of whom was the Captain, Lawrence Tousignant.

7. The body of Lawrence Tousignant has never been recovered. The court finds that he drowned as a proximate result of the sinking of the F/V TONQUIN.

8. A cause of the sinking was the entry of water through the stern of the vessel and the lack of watertight and structural integrity of the vessel's hull at that point.

9. At the time of its sinking, the F/V TONQUIN had many leaks in the stern of the vessel such that it lacked watertight and structural integrity and was unseaworthy. Actual knowledge of the structural defects in the vessel could have been obtained through a reasonable inspection of the vessel. Burton Parker, the corporate president, was onboard the TONQUIN during the days immediately prior to its last voyage during October of 1991. He knew or should have known of the structural defects in the F/V TONQUIN. His knowledge is chargeable to the corporate vessel owner, Tonquin Fisheries, Inc.

10. At the time of the sinking, the F/V TONQUIN did not have an operating bilge alarm or high water alarm anywhere onboard.

11. As of the end of May, 1991, there was no operating bilge alarm because Steve Parker, Tonquin Fisheries, Inc.'s corporate secretary and then skipper of the F/V TONQUIN, and a crew member, Robert Steinman, yanked out the wires of the bilge alarm. They yanked out the wires over frustration at its going off inappropriately and unrelated to the water level in the spaces of the vessel. There is no evidence that the bilge alarm was ever repaired before the last voyage of the F/V TONQUIN.

12. At the time of its sinking, the F/V TONQUIN had no bilge alarm whatsoever in the lazarette or in the aft fish hold, spaces subject to flooding from sea water.

13. Tonquin Fisheries, Inc., through its corporate managing agents, had actual knowledge of the absence of a functioning bilge alarm.

14. At the time of its last voyage, the F/V TONQUIN had a sufficient number of survival suits for all persons onboard, i.e., five or more survival suits onboard. All persons onboard in fact donned a survival suit before the sinking of the vessel.

15. None of the survival suits onboard was equipped with a light.

16. The Court finds the testimony of Craig Lynch, the search and rescue expert, credible and reliable. There would have been much greater probability of detection of the skipper and crew had they received early warning from the bilge alarm that the vessel was taking on water

and was sinking, or had they been wearing survival suits equipped with lights. There would have been much greater likelihood of saving the vessel from sinking had there been an earlier warning from the bilge alarm that the vessel was taking on water.

17. Tonquin Fisheries, Inc. failed to exercise reasonable care to maintain and repair the F/V TONQUIN to keep it in a seaworthy condition.

18. During the months in 1991 before the sinking of the F/V TONQUIN, Tonquin Fisheries, Inc. and its principal stockholder and president, Burton Parker, were in extreme financial distress. Tonquin Fisheries, Inc. did not provide adequate funds to purchase materials or labor to make the F/V TONQUIN safe and seaworthy, or to adequately and properly maintain the vessel.

II. CONCLUSIONS OF LAW

1. The F/V TONQUIN was unseaworthy at the time of its last voyage in the following ways.

a. It had no functioning bilge alarm in the machinery space and no bilge alarm in the lazarette or other spaces subject to flooding from sea water, all in violation of Coast Guard regulation 46 CFR §26.250.

b. The survival suits onboard were not equipped with lights in violation of 46 CFR §25.25-13.

c. The vessel lacked watertight and structural integrity. It had leaks through the hull in the stern.

2. The unseaworthiness of the vessel was within the knowledge and privity of Tonquin Fisheries, Inc. and its

managing agents Burton Parker, Eben S. Parker, and Dyann Provenzano.

3. The plaintiff, Tonquin Fisheries, Inc., and its managing agents Burton Parker, Eben S. Parker, and Dyann Provenzano were negligent in the following ways:

a. In violation of the statutory duty to provide required bilge or high water alarms in the lazarette, machinery space and other spaces subject to flooding by sea water under Coast Guard regulation 46 CFR §26.250.

b. In failing to properly equip the survival suits onboard with lights in violation of the statutory duty pursuant to Coast Guard regulation 25.25-13.

c. In failing to properly maintain and repair the vessel and to provide adequate funds obtain materials and labor to make the F/V TONQUIN safe and seaworthy.

4. The unseaworthiness of the vessel within the knowledge and privity of Tonquin Fisheries, Inc. and its managing agents and the negligence of Tonquin Fisheries, Inc. through its managing agents all constitute fault on the part of the owner of the vessel.

5. The unseaworthiness of the vessel in that it was structurally unsound and lacked watertight integrity was a proximate cause of the sinking of the vessel and the death by drowning of Lawrence Tousignant.

6. The owner of the vessel, Tonquin Fisheries, Inc., failed to meet its burden of demonstrating that the unseaworthiness of the vessel due to a violation of Coast Guard regulations concerning high water alarms was not

a proximate cause of the sinking. E.g., *Walston v. Lambertson*, 349 F.2d 660, 663 (9th Cir. 1965); *Admiral Towing Co. v. Woolen*, 290 F.2d 641, 650 (9th Cir. 1961).

7. The defendant failed to carry its burden of proof pursuant to *The PENNSYLVANIA* Rule enunciated in *The PENNSYLVANIA*, 88 U.S. 125 (1974) that the violation of Coast Guard regulation concerning bilge alarms "could not have been" one of the causes of the sinking of the vessel or the death of Lawrence Tousignant.

8. Accordingly, the Court concludes that the unseaworthiness of the vessel in failing to have adequate and functioning high water alarms in violation of Coast Guard regulations was a proximate legal cause of the sinking of the vessel and the death of Lawrence Tousignant.

9. The owner of the vessel, Tonquin Fisheries, Inc., failed to meet its burden of demonstrating that the unseaworthiness of the vessel due to a violation of Coast Guard regulations concerning lights on survival suits was not a proximate cause of the death of Lawrence Tousignant. E.g. *Walston v. Lambertson*, 349 F.2d 660, 663 (9th Cir. 1965); *Admiral Towing Co. v. Woolen*, 290 F.2d 641, 650 (9th Cir. 1961).

10. The defendant failed to carry its burden of proof pursuant to *The PENNSYLVANIA* Rule enunciated in *The PENNSYLVANIA*, 88 U.S. 125 (1974) that the violation of Coast Guard regulation concerning lights on survival suits "could not have been" one of the causes of the death of Lawrence Tousignant.

11. Accordingly, the Court concludes that the unseaworthiness of the vessel in failing to have adequate and functioning lights on survival suits in violation of Coast Guard regulations was a proximate legal cause of the death of Lawrence Tousignant.

12. The unseaworthiness of the vessel and the negligence of Tonquin Fisheries, Inc. and its managing agents were in the knowledge and privity of the owner of the F/V TONQUIN.

13. Tonquin Fisheries, Inc.'s petition for exoneration from or limitation of liability is denied and dismissed.

14. Tonquin Fisheries, Inc. is liable to the Estate of Lawrence Tousignant for all damages caused by the death of Lawrence Tousignant.

15. The Estate of Lawrence Tousignant may proceed to a trial by jury on its claim on the issue of damages only. No other issue remains to be determined.

16. The order of this Court dated January 31, 1992 enjoining prosecution of any action against the plaintiff arising out of the sinking of the F/V TONQUIN is hereby dissolved. Claimant may file her claim on the issue of damages in any court otherwise having jurisdiction.

17. The Clerk of the Court shall enter judgment accordingly. Claimant shall be awarded her costs.

DONE IN OPEN COURT this 10th day of February 1993.

/s/ Walter T. McGovern
WALTER T. McGOVERN
United States District Judge

Presented by:

FURY BAILEY

/s/ C. Steven Fury
C. STEVEN FURY
Counsel for Claimant

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

IN RE: TONQUIN FISHERIES, INC.

JUDGMENT IN A CIVIL CASE

V.

CASE NUMBER: C92-128(D)M

(Filed Febr. 23, 1994)

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Findings of Fact and Conclusions of Law entered February 10, 1994 that Tonquin Fisheries, Inc.'s petition for exoneration from or limitation of liability is DENIED and DISMISSED. Tonquin Fisheries, Inc. is liable to the Estate of Lawrence Tousignant for all damages caused by the death of Lawrence Tousignant. The Estate of Lawrence Tousignant may file its claim on the issue of damages in any court otherwise having jurisdiction.

February 23, 1994
Date

BRUCE RIFKIN
Clerk

/s/ Wendy Samson
(By) Deputy Clerk

HONORABLE WALTER T. McGOVERN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In the Matter of the Complaint of TONQUIN FISHERIES, INC., a Washington corporation, owner of the F/V TONQUIN, Official Number 529425, for Exoneration From or Limitation of Liability, Plaintiff.	IN ADMIRALTY NO. C92-0128D MOTION OF TONQUIN FISHERIES, INC., PURSUANT TO RULE 52(b), F.R.C.P., TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT **NOTE FOR MOTION CALENDAR: APRIL 1, 1994** (Filed March 8, 1994)

NOW INTO COURT, through undersigned counsel, comes Petitioner, Tonquin Fisheries, Inc., and, pursuant to Rule 52(b), F.R.C.P., moves this Court for an Order amending this Court's Findings of Fact and Conclusions of Law and Judgment for the reasons more fully set forth in the accompanying memorandum in support of said motion.

DATED this 8 day of March, 1994.

Respectfully submitted,

LE GROS, BUCHANAN & PAUL

By /s/ Clayton G. Ramsey
CLAYTON G. RAMSEY
WSBA #20572
Of Attorneys for Tonquin Fisheries, Inc.

CERTIFICATE OF HAND DELIVERY

The undersigned certifies that on this day she caused a copy of the document to which this certificate is attached to be hand-delivered to C. Steven Fury, attorney for Ymanda Tousignant, as personal representative of the Estate of Lawrence Tousignant, Defendant.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 8th day of March, 1994.

/s/ Frances M. Bellomo
Signed at Seattle, Washington

HONORABLE WALTER T. McGOVERN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In the Matter of the Complaint of TONQUIN FISHERIES, INC., a Washington corporation, owner of the F/V TONQUIN, Official Number 529425, for Exoneration From or Limitation of Liability, Plaintiff.	IN ADMIRALTY NO. C92-0128D MEMORANDUM OF TONQUIN FISHERIES, INC. IN SUPPORT OF ITS MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT (Filed March 8, 1994)

MAY IT PLEASE THE COURT:

Petitioner, Tonquin Fisheries, Inc. ("Tonquin"), moves this Court to amend its Findings of Fact and Conclusions of Law entered on February 10, 1994, and to amend the Judgment entered on February 23, 1994, to have the Findings, Conclusions and Judgment conform to the issues tried to this Court and the evidence presented at trial. Specifically, all references in the Court's Findings, Conclusions and Judgment relative to the cause of death of Lawrence Tousignant should be stricken. Likewise, the directive in the Findings, Conclusions and Judgment to Ymanda Tousignant, as personal representative of the Estate of Lawrence Tousignant ("Claimant"), that she is free to proceed to file a claim for damages and that the only issue to be tried in such a proceeding is the issue of damages should be stricken.

ARGUMENT

The issue tried to this Court in August 1993 was whether or not Tonquin was entitled to limitation from and/or exoneration from liability for damages arising from the sinking of the F/V TONQUIN on October 13, 1991. The Findings, Conclusions and Judgment entered by this Court greatly exceed the scope of the Court's inquiry and should be amended accordingly. As the Findings, Conclusions and Judgment now stand, Tonquin is precluded from arguing the contributory negligence of the decedent, Lawrence Tousignant, and the applicability of the primary duty doctrine in any subsequent proceeding on damages. Foreclosure to Tonquin on these defenses at a subsequent damage trial is inappropriate and incorrect.

The Claimant was the sole claimant is Tonquin's limitation proceeding. In July, 1993, one month before trial was to begin, the Claimant petitioned this Court, without opposition from Tonquin, to dissolve this Court's stay to permit the claimant to file her damage action in state court. The request was granted, leaving only the issue of limitation of liability to be tried before this Court. The Claimant's petition to dissolve this Court's stay was proper because this was a single claimant limitation proceeding. *Newton v. Shipman*, 718 F.2d 959 (1983). Attached as Exhibit A is this Court's Order of July 21, 1993 submitted by the Claimant's attorney and signed by this Court, specifically ordering that the only issue to be tried on August 2, 1993 was Tonquin's petition for limitation of liability, not damages.

In a limitation of liability action a trial can end in one of three ways: (1) a petitioning shipowner can be wholly exonerated from all liability; (2) a shipowner can be found liable, but upon his proof that he was free of privity and knowledge, he is declared entitled to limit his liability pursuant to 46 U.S.C. § 183; or (3) he can be found not only liable, but affected with privity or knowledge and is declared liable for all damages without benefit of the limitation statute. *Benedict on Admiralty*, § 12.

In this case, the Court found Tonquin liable and that it had privity and knowledge of the causes of the sinking of the F/V TONQUIN and should be liable for all provable damages. The issue now to be tried is damages, and the claimant has expressed her desire to proceed on that issue in state court before a jury. Consequently, this Court heard absolutely no testimony concerning damages or the defenses available to the petitioner on that issue. Despite this, the Court's Findings, Conclusions and Judgment preclude the petitioner from raising that issue in a subsequent damage trial.

This Court's Conclusions of Law No. 15, submitted by the claimant and adopted by this Court, is incorrect. That conclusion states that the only issue remaining to be tried is one on damages. More correctly stated, the issue remaining to be tried is the issue of damages *and* the defenses to that claim, including the decedent's sole or comparative negligence and the applicability of the primary duty doctrine and any other damage defenses available to TONQUIN.

The Claimant intends to proceed on her claim for damages under the Jones Act and for unseaworthiness.

Quite clearly, comparative negligence applies in both Jones Act and unseaworthiness actions, barring an injured party from recovering for the damages sustained as a result of that party's fault. *Miles v. Melrose,* 882 F.2d 1976 (5th Cir. 1989). Tonquin is entitled to assert a defense in the damage claim of the decedent's sole or comparative negligence as it is entitled to raise the primary duty doctrine, which essentially is that a maritime officer aboard a ship who has a duty to maintain ship safety, and whose failure to do so is the "sole" cause of his injury, cannot recover damages for injuries caused by that breach. *Reinhart v. United States,* 457 F.2d 151 (9th Cir. 1972).

The cleverly crafted Findings and Conclusions submitted by the Claimant to this Court for adoption is an attempt to foreclose these and other defenses by having this Court rule that there is no issue to be tried, other than the amount of damages due the Claimant. This is incorrect. While the issue of damages is certainly a matter to be tried, there are defenses Tonquin is entitled to raise to that claim.

In the Matter of the Complaint of Agust Gudjonsson, 500 F. Supp. 78 (W.D. WA 1980), Judge Beeks heard *both* a single claimant limitation of liability action *and* damage trial and, following a trial on the shipowner's claimed entitlement to limitation or exoneration, found that the vessel's sinking and subsequent injury to the claimant was caused by the shipowner's negligence. In that finding, Judge Beeks specifically found that the claimant was not contributorily negligent and scheduled a trial on damages.

In the matter tried before this Court, the decedent's sole or comparative negligence and the applicability of the primary duty doctrine, and any other defenses Tonquin might have on damages, were not heard. Despite this, the Court's Findings, Conclusions and Judgment appear to make these defenses Tonquin will seek to raise *res judicata* by implying that there are no other issues to be tried, other than the amount of damages due the Claimant.

The decedent was the captain of the TONQUIN, and as such, was primarily responsible for its safe operation in compliance with Coast Guard rules and regulations. His failure to do so resulted in his death. This will be shown at a subsequent trial on damages. It was not an issue before this Court. The only issue this Court was presented with was whether Tonquin was entitled to exoneration from or limitation from liability, and whether or not Tonquin had privity or knowledge of the causes of the sinking that would preclude it from claiming limitation.

CONCLUSION

For the foregoing reasons, this Court's Findings of Fact, specifically Findings 16 and 18, and its Conclusions of Law Nos. 5, 7, 8, 9, 10, 11, 14 and 15, should be stricken and the judgment should be amended to omit any reference to Tonquin being liable to the Estate of Lawrence Tousignant for all damages caused by the sinking of the vessel, unless reference is also made to the ability of Tonquin to raise any and all available defenses on the question of damages.

DATED this 8 day of March, 1994.

Respectfully submitted,

LE GROS, BUCHANAN & PAUL

By /s/ Clayton G. Ramsey
CLAYTON G. RAMSEY
WSBA #20572
Of Attorneys for Tonquin Fisheries, Inc.

CERTIFICATE OF HAND DELIVERY

The undersigned certifies that on this day she caused a copy of the document to which this certificate is attached to be hand-delivered to C. Steven Fury, attorney for Ymands Tousignant, as personal representative of the Estate of Lawrence Tousignant, Defendant.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 8th day of March, 1994.

/s/ Frances M. Bellomo
Signed at Seattle, Washington

HONORABLE WALTER T. McGOVERN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In the Matter of the Complaint of TONQUIN FISHERIES, INC., a Washington corporation, owner of the F/V TONQUIN, Official Number 529425, for Exoneration From or Limitation of Liability, Plaintiff.	IN ADMIRALTY NO. C92-0128D [PROPOSED] ORDER (Filed March 8, 1994)

FOR THE REASONS set forth in the Memorandum in Support of its Motion to Amend Findings of Fact and Conclusions of Law and Judgment, it is hereby

ORDERED that this Court's Findings of Fact Nos. 16 and 18, and its Conclusions of Law Nos. 5, 7, 8, 9, 10, 11, 14 and 15 are stricken, and the judgment is amended to specifically include that Tonquin Fisheries, Inc. is entitled to assert in a subsequent trial on damages all defenses available to it on that issue.

DONE this ___ day of April, 1994.

UNITED STATES DISTRICT
COURT JUDGE

Presented by:

LE GROS, BUCHANAN & PAUL

By /s/ Clayton G. Ramsey
CLAYTON G. RAMSEY
WSBA #20572
Of Attorneys for Tonquin
Fisheries, Inc.

CERTIFICATE OF HAND DELIVERY

The undersigned certifies that on this day she caused a copy of the document to which this certificate is attached to be hand-delivered to C. Steven Fury, attorney for Ymanda Tousignant, as personal representative of the Estate of Lawrence Tousignant, Defendant.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 8th day of March, 1994.

/s/ Frances M. Bellomo
Signed at Seattle, Washington

HONORABLE WALTER T. McGOVERN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In the Matter of the Complaint of TONQUIN FISHERIES, INC., a Washington corporation, owner of the F/V TONQUIN, Official Number 529425, for Exoneration From or Limitation of Liability, Plaintiff.	IN ADMIRALTY NO. C92-0128D(M) PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed March 28, 1994)

I. PROCEDURAL HISTORY

This matter was tried in Court without a jury on August 2 and 3, 1993. The Court issued its oral ruling after final argument on August 30, 1993 inviting claimant to submit proposed findings of fact and conclusions of law. Proposed findings and conclusions were submitted on December 2, 1993. The petitioner, Tonquin Fisheries, Inc., objected to the entry of the proposed findings of fact and conclusions of law and submitted its own proposed findings and conclusions. Among its objections were to proposed Finding of Fact 18 and proposed Conclusions of Law 14 and 15.

The Court, after due consideration of the presentations by the parties, amended the proposed findings of fact submitted by the plaintiff in certain regards and

entered them on February 10, 1994. Judgment was entered on these findings and conclusions on February 23, 1994.

II. CURRENT MOTION

On March 8, 1994, thirteen days after the entry of judgment, petitioner filed this motion to amend the findings of fact and conclusions of law and judgment. Again, petitioner objects to Finding of Fact 18 and Conclusions of Law 14 and 15 and other findings and conclusions. This Court has previously rejected petitioner's arguments; petitioner had ample opportunity to make all of its arguments at trial, at final argument and at the time of presentation of the findings and conclusions. For these reasons, and because petitioner's motion is untimely, it must be denied.

III. DISCUSSION

Petitioner's motion on its face is a motion to amend findings of fact and conclusions of law pursuant to Rule 50(d), Federal Rules of Civil Procedure. As it seeks also to amend the judgment, it is pursuant to Rule 59(e). Rule 52(b) states in pertinent part:

> **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment, the court may amend its findings or make additional findings and may amend the judgment accordingly.

Rule 59(e) states:

> **Motion to Alter or Amend a Judgment.** A motion to alter to amend the judgment shall be served not later than 10 days after entry of the judgment.

The 10-day time limits in Rule 52(b) and Rule 59(e) are strict and jurisdictional. After the passage of 10 days, the District Court lacks jurisdiction to grant relief under either rule. *Browder v. Director, Dept. of Corrections of Illinois,* 434 U.S. 257 (1978). As this Court lacks jurisdiction to entertain petitioner's motion, it must be denied.

DATED this 28th day of March, 1994.

FURY BAILEY

/s/ C. Steven Fury
C. STEVEN FURY
Counsel for Plaintiff

HONORABLE WALTER T. McGOVERN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In the Matter of the Complaint of TONQUIN FISHERIES, INC., a Washington corporation, owner of the F/V TONQUIN, Official Number 529425, for Exoneration From or Limitation of Liability, Plaintiff.	IN ADMIRALTY NO. C92-0128D RESPONSE OF TONQUIN FISHERIES, INC. TO CLAIMANT'S OPPOSITION TO MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT (Filed March 31, 1994)

MAY IT PLEASE THE COURT:

Tonquin Fisheries, Inc. ("Tonquin") has requested this Court, pursuant to Rule 52(b), F.R.C.P., to amend its findings of fact and conclusions of law and judgment entered on February 23, 1994, denying Tonquin's petition for limitation of or exoneration from liability for damages arising out of the sinking of the F/V TONQUIN occurring on October 13, 1991. Specifically, Tonquin has requested the Court to amend its findings and conclusions and judgment to conform to the issue that was heard at trial, i.e., whether or not Tonquin was entitled to limitation or exoneration from liability. This Court's findings and conclusions denying Tonquin limitation went far beyond that and found not only was Tonquin not entitled to limit its liability, but that the vessel's sinking proximately caused

the death of Lawrence Tousignant ("Tousignant"), the vessel captain.

Tonquin submits that the Court's finding regarding the causation of the death of Tousignant exceeded the scope of the Court's inquiry in Tonquin's limitation proceeding. The issue of causation was not before this Court. That issue has specifically been reserved by the claimant for hearing on a trial on damages that the claimant intends to file in Kodiak, Alaska.

Necessarily, a trial on damages will involve an inquiry into the causal connection between the reasons for the sinking of the F/V TONQUIN and the death of Tousignant. As a part of the damage trial, Tonquin intends to raise the defenses, among others, of sole and/or comparative fault of Tousignant with respect to the cause of the sinking of the TONQUIN and whether or not the vessel's unseaworthiness and Tonquin's negligence were the legal causes of Tousignant's death. These are issues that were not before this Court and on which no evidence was presented by Tonquin, yet this Court's findings and conclusions state that the only issues to be tried at a subsequent damage trial will be the amount of damages due the claimant. In this respect, the Court's findings and conclusions and judgment are incorrect and require amendment as suggested by Tonquin in its memorandum submitted in support of its motion to amend the Court's findings of fact and conclusions of law and judgment.

Apparently, the claimant has no opposition to the relief Tonquin requests because the claimant's reply to Tonquin's motion and memorandum neglects entirely the

merits of Tonquin's arguments and erroneously focuses on a legal technicality by suggesting that Tonquin's Rule 52(b), F.R.C.P., motion was untimely and this Court lacks jurisdiction to entertain that motion.

The claimant is plainly wrong. Judgment was entered on the Court's docket on February 23, 1994. Tonquin's Rule 52(b), F.R.C.P., motion was filed on March 8, 1994. Under Rule 52(b), a party has ten days from the entry of judgment to file its motion. While the claimant is correct that the motion was filed 13 days after judgment was entered, the claimant has apparently overlooked Rule 6(a), F.R.C.P., providing that when the period of time prescribed or allowed by the federal rules within which a party is to act is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded from the computation of time. Application of Rule 6 to the timing of the filing of Tonquin's motion reveals that, in fact, Tonquin filed its motion one day before March 9, 1994, the expiration date of its Rule 52(b) deadline.

Tonquin's motion and supporting memorandum not only was timely, but also correctly points out why the relief Tonquin requests should be granted.

CONCLUSION

For the foregoing reasons, the motion of Tonquin to amend this Court's findings of fact and conclusions of law and judgment should be granted.

DATED this 31 day of March, 1994.

Respectfully submitted,

LE GROS, BUCHANAN & PAUL

By /s/ Clayton G. Ramsey
CLAYTON G. RAMSEY
WSBA #20572
Of Attorneys for Tonquin Fisheries, Inc.

CERTIFICATE OF HAND DELIVERY

The undersigned certifies that on this day she caused a copy of the document to which this certificate is attached to be hand-delivered to C. Steven Fury, counsel of record for Plaintiff herein.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 31st day of March, 1994.

/s/ Frances M. Bellomo
Signed at Seattle, Washington

HONORABLE WALTER T. McGOVERN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In the Matter of the Complaint of TONQUIN FISHERIES, INC., a Washington corporation, owner of the F/V TONQUIN, Official Number 529425, for Exoneration From or Limitation of Liability, Plaintiff.	IN ADMIRALTY NO. C92-128D(M) ORDER DENYING TONQUIN'S MOTION TO AMEND FINDINGS AND CONCLUSIONS (Filed April 1, 1994)

The Court entered its Findings of Fact and Conclusions of Law on February 10, 1994, and Judgment was entered on these findings and conclusions on February 23, 1994. Tonquin's motion is timely; such motion may be brought not later than ten days after entry of judgment, excluding Saturdays, Sundays, and holidays. Fed. R. Civ. P. 52(b), 59(e), and 6(a).

Tonquin petitions the Court to strike Findings of Fact 16 and 18 and Conclusions of Law 5, 7, 8, 9, 10, 11, 14, and 15 and to specifically include that Tonquin Fisheries, Inc. is entitled to assert in a subsequent trial on damages all defenses available to it on that issue. Tonquin specifically desires to assert the decedent's sole or comparative negligence and to raise the "primary duty doctrine": a maritime officer aboard a ship who has a duty to maintain ship safety, and whose failure to do so is the

"sole" cause of his injury, cannot recover damages for injuries caused by that breach. *Reinhart v. United States*, 457 F.2d 151 (9th Cir. 1972).

The matter of asserting comparative negligence defenses on the issue of damages was addressed in the parties' earlier arguments on Conclusions of Law 14 and 15. Tonquin may not assert the contributory negligence of Lawrence Tousignant in defense of the damage claim because the Court has found that violation of safety statutes, specifically Coast Guard regulations concerning bilge alarms and lights on survival suits contributed to the sinking of the vessel and/or the death of Lawrence Tousignant. *See* 46 U.S.C. Appx. § 688 and 45 U.S.C. § 53.

DATED this 1st day of April 1994.

/s/ Walter T. McGovern
WALTER T. McGOVERN
UNITED STATES
DISTRICT JUDGE

HONORABLE WALTER T. McGOVERN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In the Matter of the Complaint of TONQUIN FISHERIES, INC., a Washington corporation, owner of the F/V TONQUIN, Official Number 529425, for Exoneration From or Limitation of Liability, Plaintiff.	IN ADMIRALTY NO. C92-0128D(M) ORDER ON PLAINTIFF'S MOTION TO DISSOLVE STAY (Filed July 15, 1994)

The court has heard and considered the plaintiff's motion to dissolve stay and to permit filing of a claim at law. There is a single claimant in this matter and the claimant has made the required stipulations. The court finds that the plaintiff's motion is meritorious and should be granted. According, it is

ORDERED that the order of injunction entered by the court on January 31, 1992, be, and is hereby, dissolved. It is further

ORDERED that the claimant be, and she is hereby permitted to file an action to prosecute her claim against the vessel owner. It is further

ORDERED that this court retains exclusive jurisdiction to hear and determine the issues of limitation of liability. It is further

ORDERED that the issues of limitation of liability only will be heard and tried by this court at trial on August 2, 1993.

DATED this 21st day of July, 1993.

/s/ Walter T. McGovern
WALTER T. McGOVERN
United States District Judge

Presented by

FURY BAILEY

/s/ C. Steven Fury
C. STEVEN FURY
Counsel for Claimant

HONORABLE WALTER T. McGOVERN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In the Matter of the Complaint of TONQUIN FISHERIES, INC., a Washington corporation, owner of the F/V TONQUIN, Official Number 529425, for Exoneration From or Limitation of Liability, Plaintiff.	IN ADMIRALTY NO. C92-0128D(M) CLAIMANT'S MOTION TO DISSOLVE STAY TO PERMIT FILING OF CLAIM AT LAW Note on Calendar: Friday, July 30, 1993 (Filed July 15, 1993)

RELIEF REQUESTED

The claimant requests that the court enter an order dissolving or modifying an injunction entered by the court on January 31, 1993, permitting the claimant to file and prosecute a claim at law against the plaintiff for damages arising out of the sinking of the F/V TONQUIN.

The claimant further requests that at the trial of this matter on August 2, 1993, the only issues that will be heard and determined will be the issues of limitation of liability.

GROUNDS FOR RELIEF

Claimant bases her motion on the Limitation of Liability Act, 46 U.S.C. §183 et seq., and upon the discussion and authorities cited below.

DISCUSSION

This is a limitation of liability proceeding brought by the plaintiff pursuant to 46 U.S.C. §183 et seq. Pursuant to that statute, this Court entered an injunction preventing claimant from filing an action against the plaintiff or its property with respect to the sinking of the F/V TONQUIN and requiring that any claims against the limitation fund be filed by March 16, 1992.

The period for filing claims has now come and gone and there is but a single claim filed in this court. The claimant is Ymanda Tousignant, the widow and the personal representative of the Estate of Lawrence Tousignant. Since there is but one claimant, she now requests this court to dissolve or modify the stay to permit her to file a civil action pursuant to the Jones Act, 46 U.S.C. §688, and proceed with such a case before a jury.

This is not the first notice to the plaintiff of her desire to proceed with a jury. In her Memorandum in Opposition to permit the Filing of the "Counterclaim", at p. 2, ll. 1-24, the claimant stated:

> Once the court finds fault on the part of the vessel owner, Ymanda Tousignant will ask the court to lift the stay and permit her to proceed

with her lawsuit for damages which she will file in her own community.

In her claim, claimant demanded a jury.

The required stipulations are filed contemporaneously herewith. In those stipulations, claimant acknowledges the court's right to try the limitation features of the petition and waives any claim of res judicata relevant to the issue of limited liability based upon any judgment obtained in the jury trial.

The procedure outlined by the Supreme Court in *Ex parte Green*, 286 U.S. 437 (1932) and *Lagnes v. Green*, 282 U.S. 531 (1931) and by the Ninth Circuit Court of Appeals in *Newton v. Shipman*, 718 F.2d 959 (1983), provide this court is to dissolve or modify the stay and permit the claimant to file and proceed with her action at law.

The court has the flexibility to determine order in which the actions should proceed. Generally it is true that the action at law would proceed first and the limitation action would be held in abeyance. The procedure may be reversed with the limitation issues tried first. *In Re DOUBLE D Dredging Company*, 467 F.2d 468 (5th Cir. 1972). Whether the limitation is to wait for trial of the liability issue or to precede [sic] first is within the District Court's discretion. *Newton v. Shipman, supra*, 718 F.2d 963-4.

In this case, as the limitation matter is set for trial on August 2 and the parties are prepared to proceed at that time, the claimant proposes to the court that the limitation issues only be tried on August 2, 1993. The claimant should be permitted to file her action at law pursuant to 46 U.S.C. §688 and to proceed with her damages claim before a jury.

This is not the first notice to the plaintiff of her desire to proceed with a jury. In her Memorandum in Opposition to the Filing of the "Counterclaim" the claimant stated:

> Once the court finds fault on the part of the vessel owner, Ymanda Tousignant will ask the court to lift the stay and permit her to proceed with her lawsuit for damages which she will file in her own community.

In her claim, claimant demanded a jury.

CONCLUSION

Claimant respectfully requests that, since she is the sole claimant in these proceedings, the court dissolve the stay, permit her to file an action at law pursuant to the Jones Act against the plaintiff, and proceed to trial solely on the limitation issues on August 2, 1993.

DATED this 15th day of July, 1993.

/s/ C. Steven Fury
C. STEVEN FURY
Counsel for Claimant

46 U.S.C. § 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred –

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources – including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person –

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

(As amended Dec. 29, 1982, Pub.L. 97-389, Title V, § 503(a), 96 Stat. 1955.)

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46 C.F.R. § 25.25-13 Personal flotation device lights.

(a) This section applies to vessels described in § 25.25-1 that engage in ocean, coastwise, or Great Lakes voyages.

(b) Each exposure suit carried in accordance with § 25.25-5(e), each life preserver, each marine buoyant device intended to be worn, and each buoyant vest must have a personal flotation device light that is approved under subpart 161.012 of this chapter.

(c) Each personal flotation device light required by this section must be securely attached to the front shoulder area of the exposure suit, life preserver, or other personal flotation device.

(d) if a personal flotation device light has a non-replaceable power source, the light must be replaced on or before the expiration date of the power source. If the light has a replaceable power source, the power source must be replaced on or before its expiration date and the light must be replaced when it is no longer serviceable.

(44 FR 38783. July 2, 1978, as amended by CGD 82-076a. 49 FR 4483, Feb. 7, 1994)

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46 C.F.R. § 28.250 High water alarms.

On a vessel 36 feet (11.8 meters) or more in length, a visual and audible alarm must be provided at the operating station to indicate high water level in each of the following normally unmanned spaces:

(a) A space with a through-hull fitting below the deepest load waterline, such as the lazarette;

(b) A machinery space bilge, bilge well, shaft alley bilge, or other space subject to flooding from sea water piping within the space; and

(c) A space with a non-watertight closure, such as a space with a non-watertight hatch on the main deck.

Supreme Court, U.S.
FILED
DEC 13 1995
CLERK

No. 95-861

In The

Supreme Court of the United States

October Term, 1995

In the Matter of the Complaint

of

TONQUIN FISHERIES, INC., a Washington corporation, owner of the FV TONQUIN, Official No. 529425, for Exoneration From or Limitation of Liability,

Petitioner.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in holding that Section 53 of the Federal Employer's Liability Act, 45 U.S.C. § 53, which prohibits a reduction of an employee's damages for comparative negligence where the employer's violation of "any statute enacted for the safety of employees contributed to the death or injury of such employee," barred the employer's reliance on the doctrine of comparative negligence under the Jones Act, where the seaman's death was caused by his employer's violation of Coast Guard safety regulations implementing the Commercial Fishing Vessel Safety Act of 1988?

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RESPONSE TO STATEMENT OF THE CASE

A. Statement of Facts.

1. The TONQUIN Was A Wooden-Hull Vessel Built In 1943, And Owned By The Parker Family For Many Years Before It Sank In October, 1991.

The TONQUIN was a wooden-hull vessel built in 1943 by the U.S. Navy. (RT 33)[1] She measured 105 feet in length, and had a capacity of 199.6 gross tons. (RT 33, 35) (Exhibit A-133)

The TONQUIN was owned by petitioner Tonquin Fisheries, Inc. (RT 21) Burton Parker, president of Tonquin Fisheries, first worked on the TONQUIN when he was in high school in about 1967. (RT 22) The TONQUIN had been converted to a stern trawler in 1962, and that was its configuration when it sank. (RT 312) After Mr. Parker's father sold the TONQUIN, she sat unattended in Kodiak Harbor for about six years. (RT 308-09) During this time, the boat was used by local drunks as a flophouse, was subjected to considerable abuse and vandalism, and even partially sank. (Burke, p. 13, RT 309) Burt Parker repurchased the boat in the 1980's and worked with his brother Steve Parker to repair it. (RT 310, 312, 314) The Parkers began fishing with the boat once again in 1987. (RT 312) Steve Parker served as captain. (RT 32)

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[1] Citations are to the Reporter's Transcript (RT), the Depositions filed in the district court (e.g., Burke p.13), and to the decisions of the district court and Court of Appeals which have been attached as the appendix to either the Petition for Certiorari (e.g., Pet. App. 9), or Respondent's Brief in Opposition (e.g., Resp. App. 2-3).

The Parkers placed the TONQUIN into a corporation in 1989, with Burt as president and Steve as secretary. (RT 29)

2. The TONQUIN Was Unseaworthy When It Sank Off The Alaskan Coast.

The TONQUIN sank on October 13, 1991, while fishing off the south coast of Kodiak, Alaska. Respondent's husband, Larry Tousignant, was the captain of the vessel. His body was never recovered. His death was caused by the sinking of the TONQUIN. (F/F 4-7, Pet. App. 9)

a. The TONQUIN Lacked A Watertight Lazarette.

The TONQUIN was unseaworthy in many respects. For instance, the TONQUIN lacked a watertight lazarette. The lazarette is the rear compartment at the stern of a vessel. The lazarette serves as a stern collision bulkhead for the ship so that leaks in the stern do not flood the entire vessel. (Windsor, pp. 20-21) Without a watertight lazarette, a vessel would not be seaworthy for service in the Gulf of Alaska in October. (Windsor, pp. 21-22) A crew member testified to his observations while he was a crew member in early 1991:

> The boat was just starting to leak just too bad, something had to be done with it. I was pumping the boat out every two hours. It took me an hour and a half to get the bilge dry again.

(RT 87) Shipyard repairs in Astoria in early 1991 temporarily slowed the leaks, but the leaks resumed. (RT 98)

While in the lazarette, a crew member could look up to the corner where the bulwarks come down to the hull, and see daylight where the wood had rotted away at the stern. The lazarette had deteriorated to the point that you could "take your fingernail and knock out a chunk of wood." (Mielus, p.10)

In May 1991, diesel mechanic Randall Erickson observed the TONQUIN crew securing the boom by tying it off to the stern of the vessel. (Erickson, p. 12) As the crew winched up the boom to take the slack out of the line, the deck pulled away from the hull:

> It separated under the deck. The wood, the way it was built, just split. It had been split. It was an old rot. And it just pulled the boat up, then they let it down again.

(Erickson, p. 12) Corporate officer, Steve Parker, was skipper of the TONQUIN at the time. (Erickson, p. 27) After seeing the deck split away from the stern, Erickson refused to take the TONQUIN out of the harbor for sea trials to test his repairs on the diesel engine. (Erickson, p. 16)

Various crewmen described substantial leaks in the aft fish hold. The stanchions, or upright posts in the stern of the vessel shown on Exhibit A-121, were loose and leaked into the fish hold. (RT 91-92, 119; Rohl, pp. 6-7; Swenson, p. 8) Crewman Rohl, who was aboard the F/V TONQUIN when it sank, testified that the stanchion leaked "gallons every time there was standing water on the deck." (Rohl, p. 22) Water also leaked into the aft fish hatch through the hatch cover itself. (RT 91) Only 4 out of 14 bolts on the hatch cover were in working order.

(Burke, pp. 21-22) The edge of the cover was so badly bent out of shape that it did not maintain contact with the gasket, 25% of which was either inoperable or missing. (Burke, p. 22)

One of the knee braces in the aft fish hatch was so badly cracked that a crew member could see the bolts inside the brace. (Burke, pp. 29-30) A knee brace is a structural support piece which holds the boat together where framing comes together at an angle. The knee braces keep the hull from twisting out of shape. (Windsor, pp. 26-27) A professional engineer testified that the split knee brace, the leaks through the stanchion mountings, and the leaking hatch each rendered the F/V TONQUIN unseaworthy for service in October in the Gulf of Alaska. (Windsor, pp. 28, 33, 34)

The district court found that, "At the time of its sinking, the TONQUIN had many leaks in the stern of the vessel such that it lacked watertight and structural integrity and was unseaworthy." (F/F 9, Pet. App. 9) Petitioner did not challenge this finding on appeal. (Pet. App. 3)

b. The TONQUIN Had No Functioning Bilge Alarm.

The district court found:

> 10. At the time of the sinking, the F/V TONQUIN did not have an operating bilge alarm or high water alarm anywhere onboard.
>
> 11. As of the end of May, 1991, there was no operating bilge alarm because Steve Parker, Tonquin Fisheries, Inc.'s corporate secretary and then skipper of the F/V TONQUIN, and a crew

> member, Robert Steinman, yanked out the wires of the bilge alarm. They yanked out the wires over frustration at its going off inappropriately and unrelated to the water level in the spaces of the vessel. There is no evidence that the bilge alarm was ever repaired before the last voyage of the F/V TONQUIN.

(F/F 10, Pet. App. 9-10) Crewman John Sprague saw Parker rip out the alarm. (RT 95-96) Sprague never again heard the bilge alarm sound. (RT 96) Two crewmen who survived the sinking testified that they never heard the bilge alarm sound on the TONQUIN, and it did not sound the night of the sinking. (Rohl, pp. 17, 34-35, 39; Swenson, pp. 11, 25) Crewman Burke, who left the boat shortly before the sinking, testified that the bilge alarm did not work and he never heard it sound. (Burke, p. 44)

Petitioner did not challenge the district court's findings concerning the bilge alarm on appeal. (Pet. App. 3)

c. The Survival Suits On The TONQUIN Had No Lights.

The district court found that, "None of the survival suits on board was equipped with a light." (F/F 15, Pet. App. 10) Mrs. Tousignant's counsel read into the record the vessel owner's response to Request for Admission No. 2.

> At the time of the sinking of the F/V TONQUIN there were no lights on the survival or emergency suits aboard. Admit or Deny. Admitted. Burt Parker's interview with the surviving crew

> members following the sinking of the F/V TONQUIN reveals that none of the survival suits were equipped with light.

(RT 162) The testimony of the crewmen is consistent with the owner's admission. (RT 93; Rohl, pp. 13-14; Swenson, p. 21; Burke, pp. 55-56)

Petitioner did not challenge this finding on appeal. (Pet. App. 3)

3. Larry Tousignant Became Skipper Of The TONQUIN Four Months Before It Sank.

Burt Parker, president of the corporate vessel owner, first hired Larry Tousignant in the early 1970's because Tousignant was an excellent "web man" or net maker. (RT 46; Burke, pp. 8-9) Prior to taking over the TONQUIN, Larry Tousignant had been a deckhand. (RT 47) Parker described Tousignant as a very good deckhand, "one of the best I've had." Tousignant's only prior experience as skipper was to steer the boat while the captain slept (RT 47-48), and to act as skipper of the TONQUIN in 1989 during the oil clean up under charter to the Exxon Corporation. (RT 47)

Tousignant became skipper of the TONQUIN around June 1, 1991. He took three weeks off and returned to Seattle, then assumed his duties as skipper. (RT 316) Tousignant skippered the TONQUIN for the halibut season in August 1991, then took it out in October for its final fateful voyage. (RT 317)

4. Larry Tousignant Could Probably Have Been Saved If The Bilge Alarm Had Worked Properly And The Survival Suits Had Been Equipped With Lights.

The TONQUIN sank at 2:40 a.m. in total darkness on October 13, 1991. (F/F 5, Pet. App. 9; RT 137) Swells were 12 to 15 feet with winds of 20 to 25 knots, gusts as high as 45 to 50. *Id.* Vessel owner president Burt Parker admitted that this weather is not unusual for the Gulf of Alaska at that time of year, and testified that the boat should have been able to withstand these conditions. (RT 42) Tousignant could have continued fishing, but two of the crewmen were inexperienced, and all were tired. (Swenson, p. 17) Tousignant decided to wait until calmer weather in the morning so that they could get in one last day of fishing. (Swenson, pp. 16-17)

Crewman Swenson took the wheel from 10:00 p.m. to midnight. (Swenson, p. 47) Tousignant told the engineer to run the bilge pump periodically and then retired to his bunk. (Swenson, p. 48) The TONQUIN seemed to be doing fine and Swenson noted nothing wrong when he checked the aft deck three or four times during his watch. (Swenson, pp. 18, 47) Swenson checked the engine room at the end of his watch and saw no noticeable accumulation of water. (Swenson, p. 50) Crewman Rohl took the helm at midnight and Swenson went to bed. (Swenson, p. 50) An hour into his watch, the vessel began to list, and when the inclinometer reached 10°, Rohl awakened the engineer and sent him to check the engine room. (Rohl, pp. 12, 32) Within three or four minutes, the TONQUIN

was listing 25°. (Rohl, p. 32) At that point, things happened quickly:

> I woke the engineer up and I told him to go down and check the bilges to see if we had a lot of water. He came back up and said there's a whole bunch of water, or something to that effect, and I awakened Larry. At that point, Larry took the wheel, I went down below and looked, and the entire stern was awash.

(Rohl, p. 12)

All crewmen got into survival suits. (Rohl, p. 13; Swenson, p. 20) They radioed their coordinates to the Coast Guard, and after the second Mayday, the engine and generator died. (Swenson, p. 21) The entire crew made it out on the deck and launched the life raft, which deployed upside down. (Swenson, p. 22) Tousignant told the crew to tie themselves off to the painter line on the life raft, but none of the crew did so, and no one saw whether Tousignant tied himself off. (Rohl, p. 36; Swenson, p. 23) The TONQUIN slid out from under the crew, and no one ever saw Larry Tousignant again. (Rohl, p. 14; Swenson, pp. 23-24) The other four crewmen were rescued.

Professional Engineer Windsor testified that a combination of unseaworthy factors caused the TONQUIN to sink on the night of October 13, 1991:

> I think the ship began to take water in the lazarette and because of the leverage drew the stern down. This is a fine-ended vessel which means that when you get down too much by either the stern or the bow there will be a point of – it's chaos, so to speak, where it can either

> stay level, it can roll to port or it can roll to starboard. If it rolls to either port or starboard, it will do so suddenly and it will do so severely, it will be between 15 and 25 degrees, just like a canoe does when you push down on the end of it. Once the aft hatch got submerged because of the combination of down by the stern and roll, then water probably went into the fish hold augmenting the water already flooding the lazarette, the vessel simply didn't have enough buoyancy to withstand that, she went on down.

(Windsor, pp. 38-39)

Search and rescue consultant, Craig Lynch, who had 22 years search and rescue experience in the Coast Guard, testified that remarkably good equipment was available for the search for the survivors of the TONQUIN sinking. (RT 139) Within an hour and a half there were three search and rescue vessels on site. (RT 139) Lynch testified that the probability of rescuing Larry Tousignant would have been 500% higher if his survival suit had been equipped with a proper light as required by Coast Guard regulation. (RT 148)

Crewman Rohl testified firsthand to the importance to a light on a survival suit:

> Probably an hour or two [after the sinking] . . . a Coast Guard helicopter hovered in the vicinity of me approximately – well, close enough that I could have thrown a rock and hit it. He couldn't see me. . . . I was slapping the water, yelling and screaming – of course, you couldn't hear me over the rotor noise. But like I said, he was close enough that I could have thrown a rock and hit him. Had I had a light I probably would have

> been rescued at that point. Had I had a flare I probably would have been rescued at that point.

(Rohl p. 15) Rohl was later rescued by a fishing vessel.

Lynch testified that a bilge alarm would also have increased the likelihood of rescuing Mr. Tousignant:

> The other three people on the boat were rescued – correction, four people on the boat were rescued, and had this crew all had more warning, even though there was confusion, I think the more warning would have given less confusion, better egress, better chance to stay together, chance to have gotten into this life raft right side up and use the life raft with the signaling device that was in it or should have been in it, keep together as a group.
>
> Mr. Tousignant was the most qualified, I guess, at sea of the bunch, or one of the more. We had two green crewmen that survived just fine. So my feeling is, yes, more warning would have made a more effective rescue.

(RT 149)

Crewman Rohl testified that a bilge alarm would have alerted them earlier to the presence of water in the engine room or fish hole, and they could have immediately turned everyone out for bailing out the water. (Rohl pp. 35, 39) Rohl concluded, "If we had an alarm system on that boat it probably would have never sank." (Rohl p. 39)

Based on this evidence, the district court found that "the proximate cause of the loss of Mr. Tousignant's life was the absence of a bilge alarm in good working order

and the lack of survival suits with lights" (Resp. App. 2-3) and entered the following finding of fact:

> The Court finds the testimony of Craig Lynch, the search and rescue expert, credible and reliable. There would have been much greater probability of detection of the skipper and crew had they received early warning from the bilge alarm that the vessel was taking on water and was sinking, or had they been wearing survival suits equipped with lights. There would have been much greater likelihood of saving the vessel from sinking had there been an earlier warning from the bilge alarm that the vessel was taking on water.

(F/F 16, Pet. App. 10-11)

The petitioner did not challenge this finding on appeal. (Pet. App. 3)

5. Managing Agents Burt Parker And Steve Parker Knew That The TONQUIN Was Unseaworthy And Were Negligent In Failing To Provide a Bilge Alarm, Lights For The Survival Suits, And Funds For Proper Maintenance And Repair.

Corporate secretary Steve Parker was captain of the TONQUIN before Larry Tousignant assumed command. (RT 32) Burt Parker testified that in his opinion, Steve Parker "knew the vessel TONQUIN better than anyone else." (RT 28) Steve Parker obviously knew that the TONQUIN had no functioning bilge alarm, since he himself ripped the wires out. (F/F 11, Pet. App. 10) After the sinking, Parker's accountant, Dyann Provenzano, asked

the corporate attorney to remove Steve Parker as corporate officer and back date the removal to February 1990, prior to the sinking. (RT 30) In early 1991, crewman John Sprague told Steve Parker and the rest of the crew that he was not going to continue fishing on the TONQUIN because it scared him. (RT 99)

Burt Parker testified that he was aboard the TONQUIN many times during the summer of 1991 (RT 332), and that he is knowledgeable about wooden hulled vessels and knows how to inspect them. (RT 23-24) Two crewmen who testified for the vessel owner both admitted that Burt Parker is concerned about the condition of his vessels, pays attention to the vessels whenever they are in town, and checks their condition. (RT 67, 300) Burt Parker admitted that he knows what a bilge alarm looks like and how to look for it. (RT 25) He admitted that he could tell by looking at a hatch if it was in bad condition, whether there were lights on a survival suit, whether a bilge alarm is operable, and whether a stanchion was loose. (RT 332)

Burt Parker listed the TONQUIN for sale two and a half months before it sank. (RT 65) Parker admitted that he had serious discussions with a potential purchaser named Rod Carew. (RT 65-66) Carew testified that he had a limited amount of money, and that he told Burt Parker and Larry Tousignant that Parker would have to correct any deficiencies in the boat before Carew would buy it. (Carew, pp. 6-7) Tousignant told Carew that the alarms on the boat did not work, including the bilge alarm. (Carew, p. 8) He also told him "about the life raft and the survival suits . . . I needed at least seven or eight survival suits on board." *Id.* Carew discussed these problems with Burt

Parker, who acknowledged that he was aware of the problems including the bilge alarms. (Carew, p. 9)

Burt Parker's accountant testified in her deposition that she had spoken with Mr. Carew about problems with the TONQUIN and had passed that information on to Burt Parker before the TONQUIN sank. (RT 254) After talking with counsel for the vessel owner, the accountant changed her testimony at trial and claimed that she had only spoken with Mr. Carew after the TONQUIN sank. (RT 254-55) Burt Parker also claimed that Carew only told him about the problems with the TONQUIN after the sinking (RT 327-28) The district court chose to believe Mr. Carew.

The district court found that the managing agents of the corporate vessel owner were Burt Parker and his brother Eban Stephen Parker. (F/F 3, Pet. App. 8-9) The district court further found that the managing agents of the corporate vessel owner knew or should have known that the vessel was unseaworthy:

> 9. At the time of its sinking, the TONQUIN had many leaks in the stern of the vessel such that it lacked watertight and structural integrity and was unseaworthy. Actual knowledge of the structural defects in the vessel could have been obtained through a reasonable inspection of the vessel. Burton Parker, the corporate president, was onboard the TONQUIN during the days immediately prior to its last voyage during October of 1991. He knew or should have known of the structural defects in the TONQUIN. His knowledge is chargeable to the corporate vessel owner, Tonquin Fisheries, Inc.
>
> . . .

> 13. Tonquin Fisheries, Inc., through its corporate managing agents, had actual knowledge of the absence of a functioning bilge alarm.

(Pet. App. 9-10)

Petitioner did not challenge these findings on appeal. (Pet. App. 3)

B. Procedural History

Faced with an action for the wrongful death of Larry Tousignant, the petitioner filed an action in the Western District of Washington to limit its liability to the value of the vessel. (Pet. App. 39) U.S. District Court Judge Walter McGovern denied the petition to limit liability, holding that the TONQUIN was unseaworthy and that the vessel owner's negligence and knowledge of the structural defects, lack of a bilge alarm and lack of lights on the survival suits established its privity with these unseaworthy conditions. (Pet. App. 9-14) The district court lifted the stay enjoining prosecution of actions arising from the sinking of the TONQUIN, allowing Ymanda Tousignant, as Personal Representative of the Estate of Lawrence Tousignant, to proceed with her wrongful death action. (CL 15, 16, Pet. App. 14; Pet. App. 36-37)

The district court held that the TONQUIN was unseaworthy, in part, because the petitioner violated Coast Guard regulations. (CL 1, Pet. App. 11) These violations contributed to the death of Larry Tousignant. (CL 8, 11, Pet. App. 13-14) Therefore, the district court held that the vessel owner was liable for all damages caused by the death of Larry Tousignant. (CL 14, Pet. App. 14)

The petitioner moved for reconsideration of the district court's findings, claiming that it should be entitled to assert the defenses of comparative negligence and primary duty in the Estate's Jones Act action for damages. The district court reiterated its finding that the vessel owner's violation of safety statutes contributed to the sinking of the vessel and Larry Tousignant's death:

> Tonquin may not assert the contributory negligence of Lawrence Tousignant in defense of the damage claim because the Court has found that violation of safety statutes, specifically Coast Guard regulations concerning the bilge alarms and lights on survival suits contributed to the sinking of the vessel and/or the death of Lawrence Tousignant.

(Pet. App. 35) The district court denied the petitioner's motion and held that Section 53 of FELA, 45 U.S.C. § 53, barred the defenses of comparative negligence and primary duty. (Pet. App. 34-35)

Petitioner appealed the district court's judgment to the Ninth Circuit Court of Appeals. Petitioner challenged the district court's legal conclusion that it could not assert the doctrines of comparative negligence or primary duty in the Estate's Jones Act case. (Pet. App. 3-4)

The Court of Appeals rejected Tonquin's argument and affirmed the district court in an unpublished memorandum opinion. (Pet. App. 1-7) The Court of Appeals noted that Tonquin did not challenge the district court's findings that Tonquin and its managing agents violated statutory duties of safety, which proximately caused Larry Tousignant's death. (Pet. App. 3, 5-6) The Court of Appeals held that these findings and conclusions "were

necessary components of the district court's litigation analysis" because the district court had to determine what acts of negligence or unseaworthiness caused the accident to occur. (Pet. App. 5-6) The Court of Appeals held that the district court's findings and conclusions precluded petitioner from raising issues of Larry Tousignant's comparative negligence under Section 53 of FELA and "that Tonquin would be liable to the estate for all damages arising out of Captain Tousignant's death." (Pet. App. 6)

ARGUMENT FOR DENYING THE PETITION

The petitioner asks this Court to review an unpublished memorandum decision, affirming a district court's factual findings which were unchallenged on appeal, and construing the plain language of an unambiguous statute consistent with the opinion of another circuit of the Court of Appeals. Petitioner has offered no argument that the decision of the Court of Appeals meets any of this Court's criteria under Sup. Ct. R. 10. This Court should deny the petition because the decision below was a correct interpretation of federal law.

A. The Plain Language Of Section 53 Precludes The Imposition Of Comparative Negligence Where, As Here, The Employee's Injuries Are Caused, In Whole Or Part, By The Employer's Violation Of A Statutory Duty Of Safety.

The Court of Appeals decision construes a plain and unambiguous statute. Congress rejected the reduction of

a seaman's damages for comparative negligence where the seaman's injury was caused, in whole or in part, by the employer's violation of a safety statute under Section 53 of the Federal Employer Liability Act ("FELA") 45 U.S.C. § 53. Rather than constituting a far reaching "departure from the accepted and usual course of judicial proceedings," Sup. Ct. R. 10, the Court of Appeals adopted the only logical interpretation of Section 53 based upon its clear language.

Section 53 of FELA unambiguously precludes any reduction of an employee's injuries for comparative negligence where the employer's violation of a safety statute contributes to the employee's injury:

> . . . [T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. § 53.

The Jones Act expressly grants to seamen all the rights and remedies available to railroad workers under FELA:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law . . . and in such action all statutes of the United

> States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . .

46 U.S.C. § 688. Section 53 of FELA, including its prohibition against comparative negligence upon a finding of an employer's violation of a safety statute, is part and parcel of the rights and remedies granted to respondent under the Jones Act.

Petitioner's dissertation on the role of comparative fault in admiralty jurisprudence is wholly irrelevant to the issue at hand because Congress has enacted an unambiguous rule of law, which precludes the imposition of comparative negligence where a violation of safety statutes has contributed to a seaman's death in a Jones Act case. This Court has noted that it may not ignore the plain language of a statute merely because Congress enacted a rule with which the Court may disagree:

> When Congress does speak directly to a question, the courts are not free to supplement Congress's answer so thoroughly that the Act becomes meaningless.

Miles v. Apex Marine Corp., 498 U.S. 19, 111 S. Ct. 317, 325, 112 L. Ed. 2d 275 (1990) (quotation omitted). Moreover, the cases relied upon by petitioner in its discussion of the doctrine of comparative negligence involve the application of the doctrine to claims for property damages under admiralty law, personal injuries under general maritime law or under the Jones Act in the absence of a

safety statute violation.[2] They provide no guidance on the construction of Section 53.

Confronted with the plain language of Section 53, petitioner contends that the statute bars only the imposition of "contributory negligence and not comparative fault," (Petition at 10) and mandates the application of comparative fault in all cases, even where the employer has violated a safety statute. Petitioner's semantic argument creates a distinction without a difference. Congress enacted a system of "proportionate" or "comparative" fault, but called it "contributory negligence," employing the term in use at the turn of the century. Petitioner's interpretation effectively reads the proviso of Section 53 out of the statute, making the proviso a nullity. By contrast, the Court of Appeals' decision gives effect to the entire statute, including the proviso. *See* ***Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana***, 472 U.S. 237, 249, 105 S. Ct. 2587, 2594, 86 L. Ed. 2d 168 (1985).

This Court should deny the petition because Congress meant to bar the imposition of any type of contributory negligence under FELA, including comparative

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[2] *See* ***United States v. Reliable Transfer Co.***, 421 U.S. 397, 95 S. Ct. 1708, 44 L. Ed. 2d 251 (1975) (Court applied Jones Act comparative negligence principles to property damage case in admiralty); ***Dickens v. United States***, 815 F. Supp. 913 (E.D. Va. 1993) (seaman's action for unseaworthiness); ***Petition of New England Fish Co.***, 465 F. Supp. 1003 (W.D. Wash. 1979) (same); ***Williams v. Hollywood Marine***, 717 F. Supp. 437 (E.D. La. 1989) (general maritime law); ***Superior Oil Co. v. Trahan***, 322 F.2d 234 (5th Cir. 1963) (Jones Act – no safety statute violation); ***Walsh v. Boston Sand & Gravel Co.***, 175 F. Supp. 411, 413 (D. Mass. 1959) (same).

negligence, where an employee's injuries have been caused by the employer's safety statute violation.

B. The Court Of Appeals Decision Follows This Court's Precedent Interpreting The Jones Act And Is In Accord With The Only Other Court Of Appeals Decision Addressing FELA Section 53's Prohibition Of Comparative Negligence Under The Jones Act.

The Court of Appeals decision comports with this Court's Jones Act precedent and is in accord with the only other Court of Appeals decision that addresses the application of comparative negligence in a Jones Act case upon an employer's violation of a safety statute. This Court should deny the petition because this unpublished memorandum decision meets none of the Court's criteria for review.

In *Kernan v. American Dredging Co.*, 355 U.S. 426, 78 S. Ct. 394, 2 L. Ed. 2d 382 (1958), this Court relied upon the language of Sections 53 and 54 in holding that the violation of a Coast Guard regulation established negligence per se under the Jones Act. Although not squarely addressing the application of comparative negligence upon a vessel owner's safety statute violation, the *Kernan* Court quoted Section 54, which uses the term "any statute enacted for the safety of employees," in holding that the violation of **any** statutory safety duty established negligence per se. 355 U.S. at 438 n.8. The Court of Appeals decision is in accord with *Kernan*.

The Court of Appeals decision also follows the only other Circuit which has addressed the application of Section 53's proviso in a Jones Act case. In ***Roy Crook and Sons v. Allen***, 778 F.2d 1037 (5th Cir. 1985), the Fifth Circuit held that Section 53 of FELA barred a vessel owner's reliance on comparative negligence because the vessel was undermanned, in violation of the manning statute, 46 U.S.C. § 222, which authorizes the Coast Guard to determine the size of the crew required on vessels. As in this case, the Jones Act claim in ***Roy Crook*** was brought by the widow of the vessel's captain. The Fifth Circuit held that the manning statute was "enacted for the safety of employees" within the meaning of Section 53, and that its violation contributed to the captain's death. The Court reversed a reduction of the judgment for comparative negligence.

As the decision below conflicts with no other Court of Appeals decisions, petitioners rely instead on district court cases interpreting Section 53 of FELA which are neither authoritative nor persuasive. In ***Heath v. Matson Navigation Co.***, 333 F. Supp. 131 (D. Ha. 1971), a firehose was used to pump molasses, in violation of a Coast Guard regulation restricting the use of firehoses for any purpose other than fire extinguishing, drills and testing. A seaman sued under the Jones Act after he tripped over the hose and was injured. The district court rejected the seaman's motion to strike the defense of contributory negligence under Section 53 for two reasons. First, the court held that the breach of the duty arose from "the violation of a non-safety statute or regulation." 333 F.

Supp. at 133. Additionally, the violation of the regulation did not contribute to the injury:

> It is the fact that the hose was left out on deck, rather than any use in violation of a regulation which brought about Heath's injury. The hose could just as readily have been left out on deck after a drill, cleaning or replacement.

333 F. Supp. at 135. In the instant case, by contrast, the district court expressly found that the violation of duties required by statutes enacted for the safety of employees, 46 U.S.C. § 4502 and § 4102 (*see infra* at 23-24), contributed to Larry Tousignant's death. (F/F 16, CL 8, 11, Pet. App. 10-14; Pet. App. 34-35)

Bertholf v. Burlington Northern Railroad, 402 F. Supp. 171 (E.D. Wash. 1975) (discussed in Petition at 16) was not a Jones Act case, but a FELA case involving a railroad worker who claimed that his injury arose from his employer's failure to inspect a crane and hoist in accordance with Occupational Safety and Health Act (OSHA) regulations. The district court held that a violation of OSHA regulations could not eliminate comparative negligence under FELA because OSHA, 29 U.S.C. § 653, expressly makes OSHA regulations inapplicable to FELA cases.[3] In the instant case, by contrast, the employer did not violate a generalized OSHA requirement which Congress made expressly inapplicable to an

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[3] 29 U.S.C. § 653(b)(4) provides that OSHA shall not "be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers. . . ."

employee's action against the employer. Instead, petitioner violated a specific statutory duty of safety limited to the fishing industry, one which lacks OSHA's proviso barring the statute's application to a worker's claim against an employer.

This Court should deny the petition because the Court of Appeals decision construing Section 53 of FELA does not conflict with any other Court of Appeals decision.

C. Larry Tousignant Was A Seaman/Employee Within The Meaning Of FELA And The Jones Act.

Larry Tousignant was a seaman within the meaning of the Jones Act and an employee under FELA. Petitioner again ignores the plain language of the statute and established precedent in arguing that a vessel's captain cannot be a "seaman" under the Jones Act or an "employee" within the meaning of FELA. *See* ***Southwest Marine, Inc. v. Gizoni***, 502 U.S. 81, 86-87, 112 S. Ct. 486, 491, 116 L. Ed. 2d 405 (1991) (exclusion under LHWCA of "master or member of a crew of any vessel" is refinement of term "seaman" under Jones Act).

Petitioner's argument is essentially that a captain cannot sue his employer even when the employer's negligence proximately causes his injury. It is simply a variety of the "primary duty" doctrine, which holds that a seaman cannot recover where only the seaman was negligent. But no circuit applies this rule, where, as here, the seaman was not solely responsible for his own injuries. Thus, a captain's claim is not barred where the owner or other employees were responsible for his injuries. *See*

Roy Crook & Sons, Inc. v. Allen, 778 F.2d 1037, 1043 (5th Cir. 1985) (Jones Act claim by captain's estate); *Johannessen v. Gulf Trading & Transp. Co.*, 633 F.2d 6553, 655 (2nd Cir. 1980) ("The issue, therefore, is whether the captain's error of judgment, negligence though it might be, was the sole cause of his death."); *Boat Dagny, Inc. v. Todd*, 224 F.2d 208, 210 (1st Cir. 1955) (Primary duty doctrine did not bar a Jones Act claim by the master of the vessel because the jury could have found on the evidence that the ship's engineer negligently failed to restore power more quickly.).

The Court of Appeals correctly rejected the petitioner's primary duty argument because petitioner, and not Larry Tousignant, had the primary duty of furnishing the vessel with a functioning bilge alarm and survival suits. Larry Tousignant was a seaman under the Jones Act and an employee within the meaning of FELA. This Court should deny the petition for certiorari.

D. Petitioner Breached A Statutory Duty Enacted For The Safety Of Employees When It Violated Coast Guard Regulations Enacted Under The Commercial Fishing Industry Vessel Safety Act Of 1988, 46 U.S.C. § 4502 and 46 U.S.C. § 4102. These Violations Contributed To The Death Of Larry Tousignant.

Petitioner breached a statutory duty enacted for the safety of employees. The Coast Guard regulation requiring a bilge alarm was promulgated pursuant to 46 U.S.C. § 4502 "which requires safety equipment and operational stability for certain vessels in the commercial fishing industry. . . . " 46 C.F.R. § 28.10. 46 U.S.C. § 4502 was part of the Commercial Fishing Industry Vessel Safety Act of

1988. The House Report recites that one of the purposes of the Act was "to establish new and more comprehensive safety requirements for commercial fishing industry vessels." 1988 ***U.S. Code Cong. and Admin. News*** p. 2149. The Report pointed out that, "Overall, commercial fishing is one of the most dangerous occupations in the United States . . . " and concluded:

> The dilemma for fishermen is made more severe by the fact that safety problems . . . are in turn exacerbated when economic pressures force boat operators to fish in harsher weather or further from shore than normal, *or to postpone or neglect needed safety improvements.*

Id. at 2150, 2151-52 (emphasis supplied). The Act prohibits the operation of any vessel in violation of regulations prescribed under the Act, 46 U.S.C. § 4504, and makes the owner, managing operator, agent, master, and individual in charge of the vessel all liable for a violation. 46 U.S.C. § 4507.

Lights are required on survival suits under 46 C.F.R. § 25.25-13, which was promulgated in 1988 pursuant to 46 U.S.C. § 4102, entitled "Safety Equipment", authorizing the Secretary of Transportation to regulate the type of lifesaving devices on uninspected vessels such as the TONQUIN. 44 Fed. Reg. 4479 (2/7/84).[4] The stated purpose of the requirement was "to prevent some of the loss of life that can occur when persons are forced to enter the water after abandoning ship." *Id.*

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[4] The regulation took effect August 6, 1984, seven years before Tousignant became skipper of the TONQUIN.

Congress enacted these statutes "for the safety of employees" within the meaning of FELA § 53. Congress even noted that the statutory scheme was all the more necessary because financial pressures might cause vessel owners "to postpone or neglect needed safety improvements", just as the district court found occurred in this case due to the owner's "extreme financial distress." (F/F 18, Pet. App. 11)

The district court found that these safety violations "contributed to the injury or death of such employee" within the meaning of FELA § 53. (Resp. App. 2-3; F/F 16, CL 8, 11, Pet. App. 10-11, 13, 14) It reiterated this determination in denying petitioner's post-trial motion:

> Tonquin may not assert the contributory negligence of Lawrence Tousignant in defense of the damage claim because the Court has found that violation of safety statutes, specifically Coast Guard regulations concerning the bilge alarms and lights on survival suits contributed to the sinking of the vessel and/or the death of Lawrence Tousignant. *See* 46 U.S.C. Appx. § 688 and 45 U.S.C. § 53.

(Pet. App. 35) The Court of Appeals correctly affirmed this decision.

E. The Court Of Appeals Decision Is In Accord With This Court's Precedent Holding That Congress Intended FELA And The Jones Act To Provide A Flexible And Evolving Remedy To Injured Employees.

Petitioner presents a misleadingly narrow view of the caselaw construing Section 53 of FELA and the Jones Act,

ignoring the liberal interpretation this Court has given to these remedial statutes. For instance, petitioner ignores eighty years of Supreme Court precedent holding that Congress meant what it said in enacting Section 53 of FELA. *See*, ***Rogers v. Missouri Pacific Railroad Co.***, 352 U.S. 500, 507 n.13, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957) ("Proof of violation of certain safety appliance statutes without more provides negligence and also eliminates contributory negligence as a consideration for any purpose."); ***Coray v. Southern Pacific Co.***, 335 U.S. 520, 524, 69 S. Ct. 275, 93 L. Ed. 208 (1949) ("And to make its purpose crystal clear, Congress has also provided that 'no such employee shall be held to have been guilty of contributory negligence in any case' where a violation of the Safety Appliance Act, such as the one here, 'contributed to the death of such employee.' "); ***Seaboard Airline v. Horton***, 233 U.S. 492, 503, 34 S. Ct. 635, 58 L. Ed. 1062 (1914) (Congress declared in Sections 53 and 54 of FELA that neither contributory negligence nor assumption of risk "shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employee").

Congress gave seamen-employees the benefit of "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees. . . . " 46 U.S.C. § 688. This Court has consistently held that this section gives injured seamen the same rights and remedies given to injured railway workers under FELA. *See* ***Kernan v. American Dredging Co.***, 355 U.S. 426, 439, 78 S. Ct. 391, 401, 2 L. Ed. 2d 382 (1958) (Jones Act "expressly provides for seamen

the cause of action – and consequently the entire judicially developed doctrine of liability – granted to railroad workers by the FELA"). In the rare case where the literal application of FELA would frustrate Congress's purpose of providing seamen liberal rights of recovery, the Court has expanded, not narrowed, Jones Act remedies:

> The Jones Act, in providing that a seaman should have the same right of action as would a railroad employee, does not mean that the very words of the FELA must be lifted bodily from their context and applied mechanically to the specific facts of maritime events. Rather, it means that those contingencies against which Congress has provided to ensure recovery to railroad employees should also be met in the admiralty setting.

Cox v. Roth, 348 U.S. 207, 209, 75 S. Ct. 242, 99 L. Ed. 260 (1955).

Petitioner's policy argument, that excusing employers' violation of statutory duties designed to protect employees would advance safety, turns logic on its head. Comparative negligence remains the general rule under Section 53 of FELA. Thus, where Congress has not imposed a statutory duty of safety upon an employer, the employer and employee share responsibility for an employee's damages in proportion to their respective fault. But Congress has chosen to secure employers' compliance with statutory standards of safety by prohibiting a reduction of an employee's judgment for comparative negligence where the employer's violation of a safety statute contributes to the employee's injury. Contrary to

petitioner's argument, the prohibition against comparative negligence upon a finding of an employer's safety statute violation promotes safety on board fishing vessels by placing responsibility on the party with the resources and primary control over the conditions of the vessel. Surely, the fishing vessel owner, who maintains a vessel season after season, is in a better position to secure a safe vessel and equipment than is the employee, whose presence on the vessel may be no more than transitory. In any event, this is a policy judgment which Congress has already made, and not one for the Court.

In addition to following the plain language of the statute, the Court of Appeals decision is consistent with this Court's liberal interpretation of the expansive remedies under FELA and the Jones Act. The Court of Appeals decision advances the public policy of enforcing compliance with safety statutes enacted for the safety of workers. This Court should deny the petition.

CONCLUSION

This is a petition for certiorari from an unpublished opinion, interpreting an unambiguous statute in accordance with the decisions of this Court and another circuit Court of Appeals, and involving a review of district court findings which were unchallenged on appeal. For the foregoing reasons, this Court should deny the petition for certiorari.

RESPECTFULLY SUBMITTED this 13th day of December, 1995.

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[p. 2] Seattle, Washington August 30, 1993

THE COURT: The first matter that we must dispose of is the claim of Evelyn Ward. On February 3, 1992, Mr. Ramsey mailed to Mrs. Ward a copy of the notice of complaint for exoneration from or a limitation of liability in this particular action. That notice expressly advises that each claimant, including Mrs. Ward, must not only file his or her claim with the court but must also serve a copy of that claim on plaintiff's attorneys. The public notice, as published in the Daily Journal of Commerce on four consecutive weeks during the month of February 1992, also expressly so advised; that is, that a copy of the claim must be served upon the attorneys for the plaintiff. Mrs. Ward did not serve a copy on plaintiff's counsel as required to do so on or before March 16, 1992, a date long passed. Claimant's motion to dismiss the claim of Evelyn Ward is, therefore, granted. Claimant's motion to dissolve the stay entered herein on January 31, 1992, upon the Tonquin Fisheries complaint for exoneration from or limitation of liability is also granted.

In brief, under the evidence before the Court and reasonable inferences to be drawn from that evidence, I find that the cause of the sinking apparently was the entry of water through the stern of the vessel and the lack of water integrity of the vessel's hull at that point.

(2) Coast Guard regulations that became effective [p. 3] September 15, 1991, a month before the vessel sank on October 13, 1991, among other things, required bilge alarms in such areas as the lazaret, machinery space and other space subject to flooding from seawater piping

within the space. This breach of a statutory duty establishes fault on the part of the owner.

(3) John Sprague testified that to the end of May 1991, there was no operating bilge alarm because Steve Parker, Tonquin's secretary, and the then skipper of the Tonquin and crew member Stineman yanked out the wires of the bilge alarm in frustration over its going off inappropriately and unrelated to the water level and spaces of the vessel. There is no evidence that the bilge alarm was ever repaired just before the voyage. The vessel corporation knowing of this had actual knowledge of the absence of a bilge alarm.

As a matter of law, there can be no other conclusion that a reasonable person could draw, to wit: the Tonquin was unseaworthy at the time of its last voyage.

And the question of causation: Craig Lynch, the search and rescue expert, testified that there would have been much greater probability of detection of the skipper and crew had they received early warning from a bilge alarm that the vessel was taking on water and had the skipper and crew been wearing survival suits equipped with lights.

(5) The proximate cause of the loss of Mr. Tousignant's life was the absence of a bilge alarm in good working order and [p. 4] the lack of survival suits with lights.

The claimant may proceed to have her claim for damages tried before a jury in this Court. Claimant shall prepare the necessary and appropriate findings and conclusions and order consonant with and including but not

necessarily limited to what I have stated here today. Serve a copy on counsel for plaintiff, and note the same for entry by the Court. Thank you for your help, fellas. We are in recess.

I, Robert R. Molezzo, Official Court Reporter, do hereby certify that I was present in court and in attendance upon the hearing of the foregoing matter; that I reported said proceedings and thereafter caused the same to be transcribed under my direction; I do further certify that the foregoing transcript is a true and accurate transcription of said proceedings.

September 28, 1993

/s/ Robert R. Molezzo

46 U.S.C. § 4102. Safety equipment

(a) Each uninspected vessel propelled by machinery shall be provided with the number, type, and size of fire extinguishers, capable of promptly and effectively extinguishing burning liquid fuel, that may be prescribed by regulation. The fire extinguishers shall be kept in condition for immediate and effective use and so placed as to be readily accessible.

(b) Each uninspected vessel propelled by machinery shall carry at least one readily accessible life preserver or other lifesaving device, of the type prescribed by regulation, for each individual on board.

(c) Each uninspected vessel shall have the carburetors of each engine of the vessel (except an outboard motor) using gasoline as fuel, equipped with an efficient flame arrestor, backfire trap, or other similar devices described by regulation.

(d) Each uninspected vessel using a volatile liquid as fuel shall be provided with the means prescribed by regulation for properly and efficiently ventilating the bilges of the engine and fuel tank compartments, so as to remove any explosive or flammable gases.

(e) Each manned uninspected vessel operating on the high seas or beyond three nautical miles from the coastline of the Great Lakes shall be equipped with the number and type of alerting and locating equipment, including emergency position indicating radio beacons prescribed by the Secretary.

46 U.S.C. § 4502. Safety standards

(a) The Secretary shall prescribe regulations which require that each vessel to which this chapter applies shall be equipped with –

(1) readily accessible fire extinguishers capable of promptly and effectively extinguishing a flammable or combustible liquid fuel fire;

(2) at least one readily accessible life preserver or other lifesaving device for each individual on board;

(3) an efficient flame arrestor, backfire trap, or other similar device on the carburetors of each inboard engine which uses gasoline as fuel;

(4) the means to properly and efficiently ventilate enclosed spaces, including engine and fuel tank compartments, so as to remove explosive or flammable gases;

(5) visual distress signals;

(6) a buoyant apparatus, if the vessel is of a type required by regulations prescribed by the Secretary to be equipped with that apparatus;

(7) alerting and locating equipment, including emergency position indicating radio beacons, on vessels that operate on the high seas; and

(8) a placard as required by regulations prescribed under section 10603(b) of this title.

(b)(1) In addition to the requirements of subsection (a) of this section, the Secretary shall prescribe regulations requiring the installation, maintenance, and use of

the equipment in paragraph (2) of this subsection for documented vessels to which this chapter applies that –

(A) operate beyond the Boundary Line;

(B) operate with more than 16 individuals on board; or

(C) in the case of a fish tender vessel, engage in the Aleutian trade.

(2) The equipment to be required is as follows:

(A) alerting and locating equipment, including emergency position indicating radio beacons;

(B) lifeboats or liferafts sufficient to accommodate all individuals on board;

(C) at least one readily accessible immersion suit for each individual on board that vessel when operating on the waters described in section 3102 of this title;

(D) radio communications equipment sufficient to effectively communicate with land-based search and rescue facilities;

(E) navigation equipment, including compasses, radar reflectors, nautical charts, and anchors;

(F) first aid equipment, including medicine chests; and

(G) other equipment required to minimize the risk of injury to the crew during vessel operations, if the Secretary determines that a risk of serious injury exists that can be eliminated or mitigated by that equipment.

(c)(1) In addition to the requirements described in subsections (a) and (b) of this section, the Secretary may

prescribe regulations establishing the standards in paragraph (2) of this subsection for vessels to which this chapter applies that –

(A)(i) were built after December 31, 1988, or undergo a major conversion completed after that date; and

(ii) operate with more than 16 individuals on board; or

(B) in the case of a fish tender vessel, engage in the Aleutian trade.

(2) The standards shall be minimum safety standards, including standards relating to –

(A) navigation equipment, including radars and fathometers;

(B) lifesaving equipment, immersion suits, signaling devices, bilge pumps, bilge alarms, life rails, and grab rails;

(C) fire protection and firefighting equipment, including fire alarms and portable and semiportable fire extinguishing equipment;

(D) use and installation of insulation material;

(E) storage methods for flammable or combustible material; and

(F) fuel, ventilation, and electrical systems.

(d)(1) The Secretary shall prescribe regulations for the operating stability of a vessel to which this chapter applies –

(A) that was built after December 31, 1989; or

(B) the physical characteristics of which are substantially altered after December 31, 1989, in a manner that affects the vessel's operating stability.

(2) The secretary may accept, as evidence of compliance with this subsection, a certification of compliance issued by the person providing insurance for the vessel or by another qualified person approved by the Secretary.

(e) In prescribing regulations under this chapter, the Secretary –

(1) shall consider the specialized nature and economics of the operations and the character, design, and construction of the vessel; and

(2) may not require the alteration of a vessel or associated equipment that was constructed or manufactured before the effective date of regulation.

(f) To ensure compliance with the requirements of this chapter, at least once every 2 years the Secretary shall examine –

(1) a fish processing vessel; and

(2) a fish tender vessel engaged in the Aleutian trade.

46 U.S.C. § 4504. Prohibited acts

A person may not operate a vessel in violation of this chapter or a regulation prescribed under this chapter.